

**Canadian Ship-Sourced Spill
Preparedness and Response**

An Assessment

**By
Robyn Allan
Economist**

**Submitted to
The Tankers Safety Expert Panel**

June 21, 2013

Table of Contents

| | |
|--|----|
| Executive Summary | 3 |
| 1. Tanker Safety Expert Panel | 5 |
| 2. Overview | 5 |
| 3. Legislative and Regulatory Framework | 7 |
| 3.1 Ship Source Oil Pollution Compensatory Regime | 10 |
| 3.2 Claims Settlement Constraints and Contradictions | 12 |
| 4. Need for Effective Evaluation and Assessment of Risk | 18 |
| 4.1 Need to Assess Current Risk Properly | 19 |
| 4.2 Federal Government’s Resource Development Rush is a Risk | 20 |
| 5. Ship-source Oil Spill Preparedness and Response Organizations | 23 |
| 5.1 Canadian Certified Response Organizations Predominantly Foreign Owned and Controlled | 24 |
| 5.2 Response Organization Ownership and Potential for Conflict of Interest | 26 |
| 5.3 Northern Gateway’s Ownership | 27 |
| | |
| Table 1: Conventions and Funds Related to Tanker Oil Spills | 12 |
| Graph 1: Crude Tanker Arrivals in Vancouver | 21 |
| Map 1: Canada’s Marine Oil Spill Response Organizations | 23 |
| | |
| Author’s Bio | 30 |

Executive Summary

Purpose

The purpose of this submission to the Tanker Safety Expert Panel is to contribute to the Panel's review by addressing a number of issues related to risk assessment, mitigation, response and compensation with particular emphasis on two key areas:

1. The appropriateness and effectiveness of the public-private response model where certified Response Organizations take the lead in preparing for and responding to an oil spill, and whether this model is capable of delivering best practices, or world-class standards; and
2. The structure and function of the liability and compensation regime and whether it can effectively satisfy the market and non-market needs of the Canadian public.

Conclusions

The discussion and analysis provided in this report finds that the current certified Response Organization model is neither capable nor effective in delivering best practices or world-class standards for marine spill preparedness and response. In addition, the structure of the existing marine liability compensation regime is not capable of satisfying the market and non-market needs of the Canadian public when a major or catastrophic spill event occurs in Canadian marine waters.

This analysis finds that:

1. There is inadequate assessment of the existing oil spill risk posed by the marine transport of crude oil and until the pan-Canadian risk assessment analysis commissioned by Transport Canada is publicly available it is not possible to conclude whether sufficient and meaningful evaluation will have been provided to the Panel for its consideration.
2. Even with an adequate assessment of the existing ship-source oil spill risk, such analysis will likely exclude non-pecuniary loss and hence is incapable of assessing the actual, and meaningful cost of an oil spill event to the Canadian public, particularly First Nations.
3. In recent years the public's risk tolerance related to oil spill pollution events has reduced to such an extent that no oil spill preparedness and response regime, particularly one driven by the private sector in pursuit of its own profit-seeking incentives, can be designed and implemented to satisfactorily address the public's legitimate concerns.

4. There is a serious disconnect between the Federal government's claim that it is designing and implementing a "world class" preparedness and response regime that protects the Canadian public's environmental, social and cultural capital when compared to the legislative, regulatory and public relations actions it has taken in recent years to promote the rapid expansion of resource development.
5. Certified, for-profit, Response Organizations are owned and controlled by predominantly foreign-based multinational oil sector interests. Ownership proposals for proposed projects, such as Northern Gateway, could see direct ownership in Response Organizations held by national oil companies of foreign governments. The conflict of interest between the corporate goals of these entities and the needs of the Canadian public is unacceptable.
6. Certified, for-profit, Response Organizations that are not arms-length to oil sector interests pose other conflict of interest concerns that requires the divestiture of these companies from their owners.
7. The Canadian public needs a Response Organization ownership structure that would ensure the Canadian public interest takes precedence in any and all decisions related to spill preparedness and response. A Federal, public authority, operating as a national and integrated Response Organization, such as a crown corporation, would confirm Canada's ability to create best practices.
8. The preparedness and response regime for ship-source oil pollution events is biased towards Response Organizations since all response costs will be reimbursed, while legitimate third party commercial loss claims may not be satisfied because of funding limits within the regime.
9. The funding limits available in the international ship-source oil pollution compensatory regime (a maximum of ~\$1.3 billion CDN) are currently inadequate to meet the needs of a major or catastrophic marine oil spill event.
10. The international regime for ship-source oil pollution events excludes non-persistent oil such as condensate, which could unduly expose the Canadian public to additional costs. This exposure will intensify if the transport of this highly toxic substance increases, as would be the case if the pipeline projects currently contemplated by the oil sector were approved.
11. Compensatory losses under the ship-source oil pollution regime are too narrowly defined and as such significant harm to environmental, social and cultural capital will go uncompensated because these losses fall outside the regime's definition of what constitutes compensable, or legitimate claims.

Canadian Ship-Sourced Spill Preparedness and Response: An Assessment

1. Tanker Safety Expert Panel

The Federal Minister of Transport, Infrastructure and Communities, has established a three member Tanker Safety Expert Panel, to review Canada’s marine oil spill preparedness and response regime as it applies to ship-source oil spills.

This Panel has been established in part to assist the Federal government in developing an enhanced marine preparedness and response regime as it seeks to become “world class” or “world leading”.

In particular, the Panel’s review will examine and make recommendations on the adequacy of the existing regime, including preparedness, response and compensation in light of existing transportation risk. The panel will also review and make recommendations with respect to the appropriate preparedness, response and compensatory regime necessitated if an increase in marine borne oil transport—either as cargo or bunker fuel—materializes because of approval for new oil sands pipelines and other major commodity export projects such as LNG.¹

The purpose of this submission is to contribute to the Panel’s review by addressing a number of issues related to risk assessment, mitigation, response and compensation with particular emphasis on two key areas:

1. The appropriateness and effectiveness of the public-private response model where certified Response Organizations take the lead in preparing for and responding to an oil spill, and whether this model is capable of delivering best practices, or world-class standards; and
2. The structure and function of the liability and compensation regime and whether it can effectively satisfy the market and non-market needs of the Canadian public.

2. Overview

Oil and other hazardous material spill events pose significant economic, environmental, social and cultural costs. It is imperative that spill events be minimized and when they occur that they be responded to in an efficient and effective manner to return the state of the economy, environment and society to a pre-spill condition as quickly as possible. As a result, any successful oil spill preparedness and response regime needs to be securely established and enforced on four broad fronts:

¹ Tanker Safety Expert Panel, Scope of the Review, <http://www.tc.gc.ca/eng/tankersafetyexpertpanel/about-98.htm>

1. Effective evaluation and assessment of risk;
2. Standards and practice that avoid or prevent the occurrence of a spill event;
3. Standards and practice that effectively respond when a pollution spill event happens; and
4. Assurances that the scope and determination of eligible costs appropriately reflect loss, and assurances that adequate financial resources are available to pay these costs in full, including clean up, remediation and compensation.

If anticipated environmental risks and related costs from oil spills are considered too extreme because they outweigh the ability of the economic, environmental and social system to effectively handle them, then government policy needs to be instituted to ensure these events do not occur, including if necessary, the restriction of transport. In this case we can say that the risk of the event has exceeded society's risk tolerance and the most effective policy option is to avoid exposure to the risk altogether.

Certainly the motivation for removing the intolerable risk to Canadian waters from the movement of oil as a cargo was behind the unanimous resolution moved in the House of Commons on May 15, 1972 when it was declared "the movement of oil by tanker from Valdez in Alaska to Cherry Point in Washington is inimical to Canadian interests, especially those of an environmental nature."²

More recently, a number of municipalities in British Columbia have stated that the transport of oil by tanker through British Columbia's marine waters poses an unacceptable risk, whether or not a spill event occurs. Even absent a spill event, the level of tanker traffic triggered by proposed pipeline projects causes environmental harm from tanker emissions, and crowds out legitimate British Columbian based economic activity including fishing and tourism.

The ongoing threat of a spill also represents intolerable social non-pecuniary cost, particularly to Aboriginal peoples and other British Columbians who live near and by coastal waters. When a spill event occurs, the social and cultural consequences will be catastrophic even if the verifiable financial consequences are not.³ In 2012 the Union of BC Municipalities passed a resolution to "oppose projects that would lead to the expansion of oil tanker traffic through BC's coastal waters."⁴

Recent public reaction, stimulated by greater awareness of growing oil pollution spill risk, clearly indicates the Canadian public, particularly in British Columbia, has a low risk tolerance for ship-source oil spills in marine waters. There is even less tolerance for

² Hansard May 15, 1972, OIL, Proposed Taps Tanker- Request for Unanimous Consent to Move Motion Under SO 43. The motion received unanimous consent, passed, but the concern was not established in legislation.

³ City of Vancouver <http://www.mayorofvancouver.ca/op-ed-pipeline-risks-are-too-great-for-vancouver>, City of Burnaby <http://www.burnabynow.com/City+council+opposes+proposed+pipeline/6700036/story.html>

⁴ UBCM Resolutions, 2012 Convention, page 13, <http://www.ubcm.ca/assets/Resolutions~and~Policy/Resolutions/Resolutions Book Combined 2012.pdf>

increased exposure to oil spill risk as represented by a significant increase in tanker traffic, which will be triggered by new oil pipeline projects such as Northern Gateway and Trans Mountain's twin.

Choosing to restrict the development of resources that pose an intolerable threat is not without precedent. For example, some provinces, including British Columbia, have stated that they will not allow the development of uranium mines or nuclear energy power because in their judgment the risks are too great. They have concluded that no system can be developed to clean up or remediate from a major accident or provide adequate compensation for those individuals, communities or regions that may be impacted. In arriving at this assessment, these jurisdictions have been able to expand the notion of unacceptable loss, and the notion of compensatory event to include a broader range of consequences, not just the market-based, commercially verifiable, consequences.

3. Legislative and Regulatory Framework

The Canadian government aims to prevent marine oil spills through regulatory oversight, inspections, and enforcement measures. Transport Canada's regulations and standards fall under the *Canada Shipping Act*, (CSA) 2001 and the *Arctic Waters Pollution Protection Act* (ABPPA), combined with international regulations established by the International Maritime Organization (IMO) and related federal legislation through the *Maritime Liability Act* (MLA).

The government also has a defined regime for response to oil spill events governed primarily under the CSA 2001. The original Act was amended in 1993 as a result of the Public Review Panel on Tanker Safety and Marine Spills Response Capability—the Brander-Smith Report—findings.⁵ This panel was established to review Canada's preparedness for a major spill such as the March 24, 1989 Exxon Valdez spill in Prince William Sound and the December 23, 1988 Nestucca spill⁶ off the coast of Washington that migrated and affected BC's coast. The Brander-Smith Panel identified significant deficiencies in Canada's oil spill preparedness in Canadian waters and made numerous recommendations.

Amendments to the CSA in 1993 established that ships operating in Canadian waters, and designated oil-handling facilities, be required to have an arrangement with a certified Response Organization (RO). The RO would develop a response plan and be prepared on

⁵ Brander Smith Report, <http://www.dfo-mpo.gc.ca/Library/117791.pdf>

⁶ The spill released 5500 barrels of Bunker C heavy oil that migrated as far as 325 kilometres along BC's coast. http://www.env.gov.bc.ca/eemp/incidents/earlier/nestucca_88.htm and The Fisherman's and Allied Worker's Union Written Final Argument to the NEB, page 42. https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/697824/960959/D203-14-1_United_Fishermen_and_Allied_Workers'_Union_-_CAW_-_Final_Arg_May_31.13_-_A312A8?nodeid=960822&vernum=0

an on-going basis to provide marine oil spill response services as needed. In Canada, certified ROs are privately owned and controlled by oil sector interests.⁷

The requirement for both tanker owners and marine facility operators to have pre-arranged contracts with certified RO's means that in the event of an oil spill into Canadian marine waters qualified response would be available to assist with clean up regardless whether the tanker operator or the marine facility operator was responsible for the spill.

It is important to note that the RO enters into a contract with the tanker owner and marine facility operator to ensure that the RO's response costs are completely reimbursed. These contracts ensure payment regardless whether these costs are covered by the tanker owners' or marine facility operators' insurance, or through other financial resources available to the shipping company or marine facility operator.

The complete reimbursement of costs incurred for ROs is in contrast to the rules for reimbursement of potential claims arising from a ship-source spill event for third parties suffering commercial losses. Should the resources available in the marine liability compensation regime prove insufficient to satisfy third-party claims for losses, these claims are pro-rated and could mean that while an RO is made whole for costs incurred in responding to a spill event, other parties harmed by this same event are not assured that their legitimate commercial losses will be made whole.

The liability and compensation regime for an oil spill caused by a tanker operator is different than the liability and compensation regime for a spill caused by a marine facility operator, even if the oil in question contaminates the same marine environment. This difference exists for both the determination of what constitutes effective clean up and remediation, and the extent of liability for commercial losses. This distinction in the regulatory regime governing an oil spill at marine facilities depending upon who is held liable (the tanker owner or the marine facility operator) is addressed in more detail below.

On July 1, 2007, the CSA was replaced by CSA 2001 as the principal legislation governing safety in marine transportation and recreational boating, as well as protection of the marine environment. It had been amended many times over the years, including the major enhancements made in 1993 as a result of the Brander-Smith Report, but had become difficult to use and in need of reform. CSA 2001 represents an updated and streamlined version of the old CSA, drafted with the intent of making it more user-friendly and easier to reference and understand.⁸

On March 18, 2013 the Government of Canada proposed further amendments to the CSA 2001 and the MLA as part of the *Safeguarding Canada Seas and Skies Act* (SCSSA). The amendments to CSA 2001 are intended to strengthen ship-source oil spill preparedness and response, enhance requirements for oil handling facilities, establish new

⁷ <http://www.tc.gc.ca/eng/marinesafety/oep-ers-regime-ros-771.htm>

⁸ <http://www.tc.gc.ca/eng/marinesafety/rsqa-csa2001-menu-1395.htm>

offences for the contravention of pollution prevention provisions including administrative monetary penalties (AMP), and extends civil and criminal immunity to Response Organizations.⁹

The amendments to the MLA found in the recent SCSSA are intended to implement the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010*.

Along with tabling the SCSSA in the legislature, the Federal Government also announced the creation of the Tanker Safety Expert Panel including the promise of further enhancing legislation once the Panel is finished its review.

In addition to the national maritime environmental protection regime, Canada is a signatory to the International Maritime Organization's (IMO) maritime regime dedicated to the prevention of pollution from ships (MARPOL), as well as the convention on Oil Pollution Preparedness Response and Co-operation (OPRC).¹⁰

The IMO has also developed an international regime for the liability and compensation of oil pollution damage caused by spills from oil tankers under the 1992 Civil Liability Convention and the International Oil Pollution Compensation Fund 1992. Canada is a signatory to both these conventions. The MARPOL, OPRC and International Oil Pollution liability and compensation conventions apply only insofar as their features are incorporated into the content of relevant Canadian legislation such as CSA 2001 and MLA.

The IMO oil pollution liability and compensation regime provides financial resources on a polluter-pay, limited liability principle. It is important to understand that while the polluter-pay principle makes the polluter liable for response costs associated with an oil pollution incident, the polluter is not responsible for all the quantifiable and legitimate costs related to an oil spill, such as claims arising from third-party commercial loss.

The funding regime currently in place effectively protects polluters from financial exposure by capping their claims liability to a predetermined level. To the extent that a major or catastrophic spill exceeds the limits of funds available in the compensatory regime, the individuals directly impacted, and/or the Canadian public, are unduly exposed to bearing these costs.¹¹

⁹ <http://www.tc.gc.ca/eng/mediaroom/releases-2013-h031e-7089.htm> and see <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6039414&File=19>

¹⁰ Marine Acts and Regulations, Transport Canada, <http://www.tc.gc.ca/eng/marinesafety/tp-tp14609-2-marine-acts-regulations-617.htm> and [http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-oil-pollution-preparedness-response-and-co-operation-\(oprc\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-oil-pollution-preparedness-response-and-co-operation-(oprc).aspx)

¹¹ See Financial Vulnerability Assessment: Who Would Pay For Oil Tanker Spills Associated with Northern Gateway, University of Victoria, Matthew Bolton for Living Oceans Society, October 10, 2010 for a more detailed discussion of the inadequacy of the compensation available under the

3.1 Ship-source Oil Pollution Compensatory Regime

Financial resources through the IMO are provided in three tiers, with the first tier represented by mandatory third-party limited liability insurance held by the tanker owner through its membership in a P&I (protection and indemnity) Club.¹² Since the Exxon Valdez spill oil tanker owners have increasingly elected to hold ownership of their ships in individual limited liability partnerships (LLP) in order to protect their overall corporate assets from undue exposure to claims related costs that might exceed the ability of their P&I insurance levels. Therefore, for purposes of this paper, it is assumed financial access to tanker owners for compensation related to an oil spill event is limited to the maximum of their P&I insurance policy.

The required policy limits under the IMO convention is determined on a sliding scale depending upon the size of the tanker as represented by the tonnage of the ship. For a ship of 140,000 units of tonnage and above, the limit is 89.77 million Special Drawing Rights (SDRs) or about \$140 million CDN.¹³

Two additional compensation tiers are provided through the International Oil Pollution Compensation Funds.¹⁴ The 1992 Fund pays a maximum of 203 million SDR's (about \$315 million CDN) and the Supplementary Fund pays a maximum 750 million SDR's (about \$1.16 billion CDN). These funds are "top-up" in that they pay to their maximum net of claims paid by the lower tiers.

Tiers are triggered when the lower tier resources are exhausted. For example, if an oil spill exceeds the tanker's P&I coverage, the Tier 2 fund pays the difference between the total claims and the Tier 1 claims to a maximum of \$315 million. The same formula is utilized for Tier 3 compensation. Total financial resources available through the international regime are approximately \$1.16 billion CDN.

It is important to note that the international Tiers 2 and 3, do not cover pollution damage from non-persistent oil composed mainly of volatile components that would be expected to evaporate or disperse in the water column, such as condensate. This is because the international regime does not anticipate non-persistent oil to have a damaging impact on the environment.¹⁵

However, the transport of condensate has increased since 2005 in southern BC marine waters since it is most often included as diluent in diluted bitumen and Kinder Morgan has increased the quantity of diluted bitumen it ships on its existing Trans Mountain

existing structure. http://www.elc.uvic.ca/press/documents/2010-02-06-Tanker-Spill-Financial-Vulnerability-Assessment_Jan15_11.pdf

¹² Introduction to P&I Insurance for Mariners, pages 6-7, [http://www.skuld.com/upload/News and Publications/Publications/Introduction to PandI/Introduction to PandI.pdf](http://www.skuld.com/upload/News_and_Publications/Publications/Introduction_to_PandI/Introduction_to_PandI.pdf)

¹³ International Oil Pollution Compensation Fund 1992, December 2008 Edition, Claims Manual, p. 10. The conversion rate used is June 13, 2013 of 1.55. Daily rates can be found at: http://coinmill.com/CAD_SDR.html

¹⁴ International Oil Pollution Compensation Funds (IOPC Funds), <http://www.iopcfunds.org>

¹⁵ Canada's Ship-source Oil Pollution Fund (SOPF) does include costs related to damage created by non-persistent oil.

pipeline since its approved capacity expansion. The transport of condensate is expected to increase significantly as an imported product, as well as exported with oil sands bitumen in Northern Gateway's dual pipeline project. Finally, condensate is intended as a diluent in the products shipped on the proposed Kinder Morgan twinning of Trans Mountain.

Although it is understood that the IOPF's intent is to rely on composition data to determine whether condensate related damage to Canada's environment and people would be covered under the international regime,¹⁶ it is extremely important that the Panel address this issue directly and explicitly because of the risk condensate currently presents in the Canadian context. The exclusion of non-persistent oil, such as condensate, from the international compensatory regime, should not lead to an increase in the financial risk posed to the Canadian public now, or as the transport of condensate increases.

When condensate, or other non-persistent oil used as diluent, evaporates, it poses a respiratory threat to humans and animals, and contains known carcinogens. The potential health costs from a major or catastrophic diluted bitumen spill, for example, at or near a marine facility, could be extensive. It should be addressed by the Panel as to why the British Columbia health care system, and by extension all Canadian taxpayers, for example, should cover health care costs related to a diluted bitumen spill caused by the transport of oil sands bitumen produced for the financial gain of multinational corporations or national oil companies of a foreign country.

Canada has introduced a fourth tier of compensation funding to augment the international system through the Canadian based Ship-Sourced Oil Pollution Fund (SOPF).¹⁷ The fund total is \$396 million CDN while the fund's maximum liability for a single spill is \$160 million CDN.¹⁸ This amount is in addition to any amount paid under Tiers 1, 2 and 3.

Total financial resources available for response, clean up, remediation and compensation from these four funding sources is about \$1.3 billion for a single marine spill event.¹⁹

The conventions and funds are summarized below in Table 1.²⁰

¹⁶ Email communication with Matthew Sommerville, Head-Claims Dept./Technical Advisor, IOPC Funds, February 27, 2013.

¹⁷ Transport Canada, <http://www.tc.gc.ca/eng/marinesafety/oep-ers-regime-funds-1119.htm>

¹⁸ Ship Source Oil Pollution Fund, Annual Report 2011 – 2012, p. iii,

<http://www.ssopfund.gc.ca/documents/AnnualReport2011-2012-e.pdf>

¹⁹ The financial resources are determined by reference to the International Monetary Fund Special Drawing Rights and hence subject to exchange rate variability. Current value of the Canadian dollar puts the total funds available at roughly \$1.3 billion.

²⁰ 2012 Fall Report of the Commissioner of the Environment and Sustainable Development, Exhibit 2.5, Chapter 2 Financial Assurances and Environmental http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201212_02_e_37711.html

Table 1

| Tier | Conventions and funds related to tanker oil spills | Total maximum compensation per incident as of 1 April 2012 (CAN\$ millions) |
|---|--|--|
| 1 | Ship-owner insurance. The International Convention on Civil Liability for Oil Pollution Damage—ship-owner liability limit supported by compulsory insurance. | \$138 (10.5%) |
| 2 | International Convention. The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992—International Compensation Fund. | \$174 (13.3%) |
| 3 | International Protocol. The Supplementary Fund Protocol of 2003 to the 1992 International Oil Pollution Compensation Fund. | \$840 (64%) |
| 4 | Canada’s Domestic Fund. Canada’s domestic Ship-source Oil Pollution Fund, 1989 (SOPF). | \$160 (12.2%) |
| Total maximum liability limit per spill incident | | \$1,312 (100%) |
| Source: 2011–12 annual reports of the Ship-source Oil Pollution Fund and International Oil Pollution Compensation Funds | | |

3.2 Claims Settlement Constraints and Contradictions

Marine spill events covered under the regime described above include accidents that occur while the tanker is waterborne or at a marine facility as cargo is being transferred from a terminal pipeline if the spill that occurs is from the tanker. If the source of a spill at a marine facility is from a terminal pipeline, or is unrelated to a cargo transfer, the spill is the responsibility of the marine operator and response and claims handling falls under the jurisdiction of the National Energy Board and related provincial statutes, not the tanker owner and related IMO framework.

With respect to a spill event not covered by the international regime, but caused by a marine facility operator, there is no limit to liability for prevention, remediation and clean up of oil spills, nor is there any limit on liability for damages to persons, property and the environment. The marine facility operator is responsible for the total costs related to the pollution event that it causes.

As a result of this unlimited exposure, the financial strength of the operator, including its available liability insurance, become important in assessing whether or not there will be sufficient funds available to appropriately respond to a spill event and pay related claims. This situation is in part responsible for the proposed Condition 147 from the NEB Joint Review Panel reviewing the Northern Gateway Project whereby the Northern Gateway Limited Liability Partnership will be required to hold \$950 million

in third-party insurance and other financial assurances.²¹

It is possible within the terrestrial and marine oil pollution liability regimes that exist in Canada that two spill events that have the exact same economic, environmental and social consequence could result in a very different level of response, preparedness, remediation and compensation because of the terms and conditions for response and claims settlement that exist within the relevant regulatory authority.

That is, the terms and conditions for oil pipeline spills in British Columbia—whether they occur in fresh water that ultimately flows to a marine environment, or from a pipeline or storage facility at a marine terminal making their way directly into the marine environment—fall under the National Energy Board and within the governing authority of the BC *Environmental Management Act* 2003 (EMA). In contrast, an oil spill impacting the same marine environment caused by an oil spill from an oil tanker falls under the *Marine Liability Act* and the international protocols of the IMO.

In both instances, the spill event would have a certified RO contracted to lead the response, but the determination of the appropriate level of response would be determined under two distinct regulatory regimes.²² As well, the funding available for the settlement of claims to harmed parties is quite different if the spill event falls under the NEB/BCEMA or the MLA. One is unlimited, while the other is capped.

The potential for a greater degree of satisfaction for claimants under one regime as compared with another is illustrated by the recent experience of the claims settlement for the Hebei Spirit oil spill in South Korea in 2007. The process has been unsatisfactory and funds available, woefully insufficient.

On December 7, 2007 a crane barge being towed by a tug collided with the anchored Chinese crude carrier *Hebei Spirit*. The barge was floating free after the cable linking it to the tug snapped in rough seas.

The accident occurred near the port of Daesan on the Yellow Sea and severely impacted the area including Mallipo Beach, one of South Korea's most popular beaches. The region affected by the spill also includes one of Asia's largest wetland areas, a national maritime park, and 445 sea farms.

About a third of the size of the Exxon Valdez spill, the Hebei Spirit leaked 10,800 tonnes of oil from three of its five tanks. The spill was responded to immediately and estimates suggest there were 1 million mandays of effort in the first 6 weeks of clean up.²³

²¹ Potential Conditions, Northern Gateway Application, NEB, Condition No. 147, <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624909/942629/A346-5-Panel-Commission-Attachment-B-Collection-of-potential-conditions-A3G7X1.pdf?nodeid=942306&vernum=0>

²² Pipeline operators are not required to contract a certified RO for terrestrial pipeline spills however ROs are expanding their services to offer such response.

²³ http://www.itopf.com/information-services/publications/papers/documents/HKSeminar08_5.pdf

The incident created South Korea's worst spill—surpassing one that occurred in 1995—with ongoing economic and environmental impacts. Financial losses related to commercial claims from the spill have not been compensated as the claims settlement process is still ongoing.

Although there are a number of complex issues related to this spill that contributed to the lengthy claims settlement process, the event identifies some of the challenges inherent in the international oil pollution fund regime. Funding limits can become sorely inadequate, and appropriate redress for legitimate losses can be frustrated. At this point, assessed claims will be pro-rated to 35 cents on the dollar, and a number of claims will likely be denied outright.

As the Annual Report from Canada's Ship-source Oil Pollution Fund explains:

“...the Hebei Spirit...represents particular challenges on account of the large number of individual claims (127,000) that have been filed with the Claims Office set up jointly by the IOPC Fund and the P&I Club in Seoul. Although it is anticipated that the amount of assessed claims will eventually fall within the amount of compensation available under the 1992 Fund Convention, the amounts claimed are significantly in excess of what is available. Consequently, the level of payment of assessed claims has been set at 35% in accordance with the prorating provisions of the convention.

The Claims Office, in dealing with the claims, is confronted with two conflicting demands. On the one hand it is being urged to speed up the claims assessment process. On the other hand, when claims are rejected, for example a block of claims (30,000) filed by fisher folk, collectively known as hand gatherers, on the grounds that no or inadequate evidence had been filed or that the required licenses for such activities had not been produced, concerns are raised in the Executive Committee as to whether such claimants have been given adequate consideration.

The Secretariat has advised that every available expert in Korea has been mobilized to assist in claims assessment. The Assembly has established a working group to study the problem of incidents where large numbers of claims are submitted and propose solutions.

There has been some discussion in the Executive Committee, based on proposals by the delegation of the Republic of Korea, for raising the level of payment of claims, but those discussions ultimately failed. The Korean government was proposing that the level of payment should be raised from the current 35% to 100% on the understanding that it would indemnify the IOPC Fund in the event that this should result in payment of compensation over the limit available from the Fund. The arrangement would have involved the provision of suitable bank guarantees. However, the cost of providing those guarantees proved to be too high, so the level of payment remains at 35%.

Under the circumstances, no early end to the claims settlement process is currently in sight.”²⁴

In January 2013 a South Korean court ordered damages to be paid by the tanker owner, the barge company, the South Korean government and the International Oil Pollution Fund.²⁵ The parties had two weeks to dispute the judgment and it is not clear if any party has filed objections.

The Hebei Spirit is not the only example of recent major spill events covered under the IOPF regime that take years to settle. By their nature, large spill events have a “long tail”—the tail being the time it takes between the event occurring and the final settlement of the claims arising from the event.

It needs to be emphasized that when claims are pro-rated, the pro-rata share of RO costs are included and hence reduce the amount available for commercial claims, but ROs have contracts with ship owners to be made whole. If these contracts are broken, ROs have access to the SOPF. This situation—where non-pecuniary losses such as traditional marine food sources, sport fishing and other leisure activity go uncompensated, while legitimate and provable commercial losses are prorated, but for-profit ROs owned by oil sector interests are made whole—is unsettling and violates our sense of fairness and due process.

There is no reason in a sophisticated and well developed preparedness and response regime for two potential standards of response and compensation to exist effectively leaving it to chance whether a harmed environment or a harmed party receives more or less redress simply as a function of who caused the harm. Harm is harm.

Although the Tanker Safety Review Panel is not charged with addressing this contradiction its existence should cause the Panel to ask how best to ensure this contradiction is addressed.

In its response to Condition 147 in the NEB Joint Review Panel potential conditions for Northern Gateway, Northern Gateway has suggested a possible, but entirely unsatisfactory approach. Enbridge on behalf of Northern Gateway has stated that regulatory changes may be “implemented to standardize financial assurance for pipelines including through national funds or other mechanisms.”²⁶

How Enbridge, as the proponent for Northern Gateway, would have access to Federal government policy direction before the general public is unclear. However, Enbridge has provided insight into what the Federal government is contemplating by further advising:

“(T)he availability of funds to address the clean-up and related costs

²⁴ <http://www.ssopfund.gc.ca/documents/AnnualReport2011-2012-e.pdf> page 62

²⁵ <http://www.whatsontianjin.com/news-5909-hebei-spirit-shipping-ordered-to-pay-694-million-over-s-korea-oil-spill.html>

²⁶ Northern Gateway Final Written Argument, Exhibit B226-3, Attachment 1, page 67 of 100.

associated with an oil spill is an issue that is common to all oil pipeline companies in Canada. A national fund may be the most efficient means of addressing public concerns and assuring that an oil spill is promptly and efficiently remediated. Each pipeline company should be required to have access to a level of funding to address a credible worst case release. The national fund would cover costs associated with a catastrophic oil release that exceed the funds available from the pipeline company that suffered the release. This type of national solution could be similar to the Canadian SSOPF and the International Funds which provide funding to cover the costs of a catastrophic marine event.”²⁷

The Tanker Safety Review Panel is encouraged to ensure that, if it suggests the Federal government address the contradiction between two regimes, that it also urge the Federal government NOT solve this problem with the development of a national fund modeled on the Marine Liability Act and IMO, particularly when ROs are owned and operated by pipeline companies and other oil sector interests. This is unnecessary government support for what is more effectively addressed in the market economy, in particular by the insurance industry.

One of the fundamental risk reduction, and hence disciplining, forces of the market system is to require a pipeline operator to obtain third party, mandatory insurance. The annual negotiations for coverage, and the resulting premiums, help regulate a company’s behavior and assist in maintaining standards of practice. A national fund would effectively take companies, like Enbridge that suffer from serious systemic risk, off the hook and remove the disciplining forces of the market from the equation. Such a fund, as proposed by Enbridge, would intensify Enbridge’s moral hazard and expose the Canadian public to even greater risk for terrestrial and marine facility spill events, than is currently the case.

It is also important to note that oil spill preparedness and response is a cost-minimization, or under certain circumstances, a profit-centre for companies like Enbridge.²⁸ Despite the company’s claims that it recognizes the public’s spill concerns and thus intends to offer extended preparedness and response for terrestrial, marine facility and waterborne events if Northern Gateway is approved, this is not a selfless offering. It is a self-serving opportunity to internalize financial benefits by being paid for preparing for, and responding to, a spill event.

Enbridge’s corporate structure allows Enbridge Inc. to own and operate pipeline assets through various corporate structures, which limit liability and tax obligations, but allows the company to maximize revenues from providing management and related services. These services extend to the development of oil spill preparedness and response, and payment for implementing these plans when events occur.

²⁷ Ibid.

²⁸ The conflict of interest and profit seeking opportunity for Enbridge extends to all pipeline and oil company interests paid for oil spill response. The detail as to how this activity translates into potentially undesirable outcomes is best explained by reference to Enbridge because of the publically available information it has been required to provide as a result of the Kalamazoo oil spill.

For example, Enbridge Inc. owns Line 6B, the source of the Marshall, Michigan Kalamazoo diluted bitumen spill which occurred on July 26, 2010. The ownership of this pipeline is through a complex of limited liability structures, including general partner and management companies.²⁹

The Kalamazoo spill is the largest and most harmful terrestrial crude oil spill in North American history, and Enbridge management's response to this spill was of such a substandard and detrimental caliber that the US National Transportation Safety Board found Enbridge to be like "Keystone Kops",³⁰ and US Congress found their claims-handling to be not only "an infringement on people's rights, but (it is) borderline fraudulent".³¹ Meanwhile Enbridge management booked \$24 million in revenue for responding to the spill, and Enbridge Inc. paid huge bonuses to their senior management for 2010 operations as if the Kalamazoo oil spill never happened.

*"In connections with the Lakehead Line 6B crude oil release, the Company provided personnel support and other services to its affiliate, EEP (Enbridge Energy Partners), to assist in the clean-up and remediation efforts. These services which were charged at cost, totaled \$6 million for the year ended December 31, 2011 (2010 - \$18 million)."*³²

Enbridge's public relations claims of altruism when promising "world class" standards of preparedness and response cannot be taken seriously, let alone trusted, when it becomes apparent that the company stands to book significant revenues for showing up to a spill it caused and ineffectively manages.

There is something fundamentally unsettling, if not reprehensible, about a for-profit company causing a spill standing to be made whole for all response costs related to the same spill—particularly if those costs are increased because of inflated management compensation and mismanagement. This concern is heightened since Enbridge, as general partner and operator of Northern Gateway, will effectively be the entity certified by Transport Canada as a Response Organization providing extended marine preparedness and response services.

²⁹ An Economic Assessment of Northern Gateway, Robyn Allan, January 30, 2013, pages 28 – 33, <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/785393/786558/D4-2-49 - Alberta Federation of Labour - Attachment 46 - Economic Assessment of Northern Gateway January 30 2012 Robyn Allan - A2L7D1.pdf?nodeid=78662>

³⁰ National Transportation Safety Board, Press Release, July 10, 2012. <http://www.nts.gov/news/2012/120710.html>

³¹ Hearing Before the Committee on Transportation and Infrastructure, House of Representatives, September 15, 2010. <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr58236/html/CHRG-111hhr58236.htm>

³² Enbridge Inc. Annual Report 2011, page 176, http://ar.enbridge.com/ar2011/assets/Downloads/2011_Enbridge-Inc-Annual-Report.pdf Bonuses are found in the 2011 Management Circular, http://www.enbridge.com/InvestorRelations/FinancialInformation/~/_media/www/Site Documents/Investor Relations/2011/2011_mic_en.ashx

The Tanker Safety Review Panel must take all efforts to avoid the situation imbedded in the certified Response Organization regime by restricting RO ownership by, and for, the benefit of oil sector interests, particularly since the ship-source oil spill regime caps the polluting party's liability, while the RO is made whole for all legitimate response costs. We do not want to entrench a situation facing the Canadian public that becomes little more than "sorry for your uncompensated loss caused by our product—here's the invoice for cleaning it up."

This conflict of interest and its potential intensification inherent in the private certified Response Organization framework, is discussed further in Section 5, below.

4. Need for Effective Evaluation and Assessment of Risk

The claim by the Federal government that it is going to design a "world class" system and that the Tanker Safety Expert Panel's role is to assist in this design, presupposes that the existing risk posed by the transport of crude oil, and the risk the expansion of crude oil transport poses, is considered to be within the risk tolerance of the Canadian public. This assumption may be false, particularly if the Canadian public fully understands what "clean up" means.

No matter how effective, efficient or well designed and implemented a preparedness and response regime is, oil spill recovery and clean up is relatively ineffective. During the Exxon Valdez oil spill response only 7 to 10 percent of the spilled oil was recovered through skimming and burning.³³ During the Deepwater Horizon spill only 8 percent of the spilled oil was recovered through mechanical means.³⁴

Even during the best weather conditions responding to an oil spill is challenging. Generally 10 to 15 percent of spilled oil in open water is recovered. These statistics are based on conventional oil spill statistics, not anticipated recovery for diluted bitumen that has entered the water column or sunk. "Transport Canada has confirmed that it is reasonable to expect only a 10 to 15 percent recovery rate of spilled oil in response operations in the CCAA (Confined Channel Assessment Area) or OWA (Open Water Area)."³⁵

It is recommended that the Panel explicitly and fully assess whether these recovery rates are acceptable to the Canadian public. It is unlikely that the risk tolerance for oil spills in Canadian waters is compatible with these low recovery rates. If the Panel is relying on these rates as the recovery rate goals which would satisfy "world class" standards, then it

³³ Northern Gateway Hearings Transcript Vol. 138, lines 8491-8498

³⁴ Northern Gateway Hearings Transcript Vol. 138, lines 8518-8522

³⁵ The Haisla Nation Final Written Argument, National Energy Joint Review Panel for Northern Gateway, page 274, https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/624910/693017/960020/D80-104-2_Haisla_Nation_Final_Written_Argument_-_31_May_2013_-_A310V0.pdf?nodeid=959797&vernum=0

is incumbent upon the Panel to indicate this and ensure that the public fully understands that the terms and conditions of its proposed recommendations is to only satisfy these low recovery rates as part of the response regime standards.

4.1 Need to Assess Current Risk Properly

The adequacy of the existing Canadian ship-sourced oil pollution preparedness and response regime is a question that can only be effectively and completely addressed in relation to an accurate and quantifiable assessment of the risk it attempts to address. It is understood that the Traffic Safety Expert Panel will have access to a “Pan-Canadian Risk Assessment” commissioned by Transport Canada to evaluate the likelihood and consequences of oil, or other hazardous and noxious substances spill, in Canadian waters.³⁶

It is unfortunate that access to this study was not made available in advance of the deadline for submissions from the public in order to better inform public input to the Panel. Access to the risk assessment would have facilitated a more informed discussion since assessed risk and prescriptions for its redress, are inextricably linked. If the risk assessment has not accurately identified the scope and nature of the risk then the regime based on this inaccurate assessment will suffer accordingly.

For example, it is known that diluted bitumen transported along Kinder Morgan’s Trans Mountain pipeline is currently loaded onto oil tankers for marine transport. It is also known that diluted bitumen can pose significant environmental risk challenges not necessarily present with conventional light oil or refined products³⁷ when spilled into fresh or marine water. Many, including the Federal government, concede that we do not know enough about the behavior of bitumen when it comes into contact with water and hence our current regime is compromised.³⁸

In a major or catastrophic marine spill event bitumen could submerge or sink and thus there is a need for alternative preparedness and response plans to deal with diluted bitumen spills, as well as significant investment in alternative capital equipment required for such response.

If Transport Canada’s commissioned risk analysis has not appropriately and extensively addressed the preparedness and response required for a diluted bitumen spill, then the effectiveness of the report will be compromised.

Another high-level issue that provides insight into this point is with respect to the claim that Transport Canada is seeking a “world class” model, when world-class systems in practice today do not generally have diluted bitumen transported by, or loaded onto, oil tankers. Certainly, the uniqueness of Canada’s products intended for transport must inform the risk assessment.

³⁶ <http://www.tc.gc.ca/eng/mediaroom/releases-2013-h006e-7044.htm>

³⁷ http://www.mlive.com/news/kalamazoo/index.ssf/2011/07/kalamazoo_river_oil_spill_resp.html

³⁸ Northern Gateway Hearing Transcript, Line 3139, June 17, 2013.

Having raised the concern that the lack of access to the risk assessment report commissioned by Transport Canada in advance of preparing this paper might result in an absence of comments that could inform the Panel, a discussion of risk related issues that can be addressed, follows.

4.2 Federal Government's Resource Development Rush is a Risk

There is a vast discrepancy between the Federal government's rush to support the development of oil sands resources and the rules and regulations governing such development. For example, the introduction of major changes to legislation such as the *National Energy Board Act* supporting the more rapid pace of industry expansion in contrast with the reduction of environmental control through changes to the *Canadian Environmental Assessment* and *Fisheries Acts*. Federal statutory efforts in support of industry seem to have taken precedence over legislation and regulations designed to enhance environmental protection.

Federally funded ad campaigns promoting rapid resource development and export, and publicly funded presentations and statements by Federal Ministers travelling across Canada and throughout the US in support of bitumen export pipelines such as Keystone XL and Northern Gateway give a false public relations message that the risks of rapid expansion and export are low.

The direct, almost unbridled, support of the Harper government for oil sector interests appear in direct contrast with the safety and protection needs of the Canadian public and the environment. This imbalance—where the needs of the public and the environment seem to take on reduced importance while the needs of the private sector are enhanced—poses what is known as “systemic risk”. That is, the bias of the Federal government increases the risk of a spill event because it leads to a reduced level of regulation and control that grants the industry permission to behave in a riskier manner. This behavior at a policy level increases the likelihood of a major or catastrophic event.

In British Columbia, an example of this dangerous bias is illustrated by the recent closing of the Kitsilano Coast Guard Station in Vancouver Harbour.³⁹ Under the auspices of budget control the Federal government severed this important link in the spill regime model⁴⁰ while publicly endorsing pipeline expansions such as Kinder Morgan's Trans

³⁹ The Kitsilano Coast Guard was the busiest in Canada.

<http://www.theglobeandmail.com/news/british-columbia/harper-defends-closure-of-bc-coast-guard-base/article8414600/>

⁴⁰ Without undertaking a risk assessment, the Federal Government claims savings of \$700,000.

<http://www.vancouver.sun.com/news/Coast+Guard+written+report+risk+analysis+closing+Kitsilano/8446754/story.html> The Federal government announced funding of \$15 million to the Calgary School of Public Policy shortly after the Coast Guard closure. This funding, (equivalent to 21 years of operating the Kitsilano Coast Guard) is to enhance “responsible resource development.”

<http://www.nrcan.gc.ca/media-room/news-release/2013/7048> The Calgary School Executive has extensive ties to the oil industry and the PMO's office—Jack Mintz sits on the Board of Imperial Oil, and Robert Mansell is a personal friend and mentor of the Prime Minister.

http://dspace.ucalgary.ca/bitstream/1880/24345/1/1991_Harper.pdf p. v

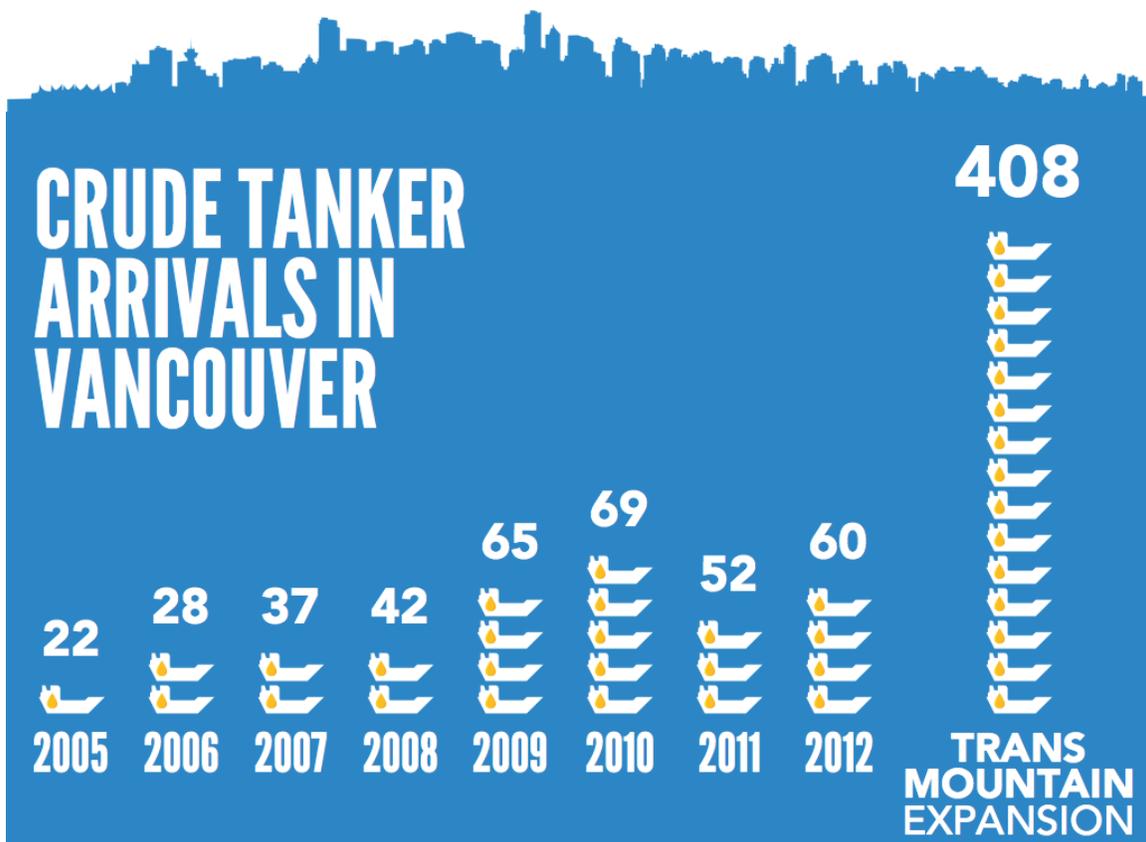
Mountain twin. Trans Mountain's expansion would see oil tanker traffic increasing almost 6 fold by 2017.

Regardless whether Trans Mountain's twin is approved and developed, the tanker spill risk facing BC southern coastal waters has never been adequately assessed as part of environmental assessment risk.⁴¹

Between 2005 to the present, the tanker spill risk through southern BC marine waters, has significantly increased because NEB approvals have expanded throughput on Trans Mountain's existing pipeline from 225,000 barrels a day to 300,000 barrels a day. As a result, oil tanker traffic increased from roughly 20 oil tankers a year to 70 oil tankers a year. The closure of the Kitsilano Coast Guard in the face of this increased spill risk and in light of the important role the station has played in its life saving and rescue during its years in operation, is particularly offensive to British Columbians.

Graph 1 below illustrates the increase in oil tanker traffic.

Graph 1



Source: Vancouver Port Authority, Kinder Morgan

⁴¹ Proposed Pipelines and Tanker Spill Risk for BC, May 6, 2012, Robyn Allan, <http://www.robynallan.com/wp-content/uploads/2012/05/Proposed-Pipelines-and-Tanker-Spill-Risk-for-BC-May-6-2012.pdf>

The contradiction between Federally supported rapid extraction and export of natural resources and the appropriate regulatory framework to mitigate the risks related to this activity were clearly pointed out in the recent Audit released by Environment and Sustainable Development Commissioner Scott Vaughan, and in the Commissioner's 2010 Report, "Oil Spills from Ships".⁴²

Mr. Vaughan told the Standing Committee on Natural Resources, that:

*"Given the central role of natural resources in Canada's economy, it is critical that environmental protection keeps pace with economic development. I am concerned by the gaps we found in the way federal programs related to natural resources are managed."*⁴³

In discussion with the media, Mr. Vaughn further explained, "(I)if environmental regulations and environmental protection does not keep pace with that level of economic activity, then it puts Canadians at risk in terms of exposure to pollutants, to contaminants -- but also exposes them to real economic costs."⁴⁴

It is assumed the Tanker Safety Expert Panel will review and assess the detailed reports and recommendations currently on the record such as those undertaken by the Commissioner of the Environment and Sustainable development that have been agreed to by relevant government agencies, but have not yet been effectively implemented. If this were not the intent of the Panel, I would encourage it to consider doing so. It is hoped the Expert Panel will summarize and reconfirm the agreed-to recommendations and hold the Federal government accountable to important work that has been undertaken prior to the Tanker Safety Panel's appointment.

Having suggested that outstanding agreed-to recommendations be acted upon, it is necessary to note that had the Federal government implemented the 2010 recommendations from the Oil Spills from Ships Report, under the timetable it promised, it is very likely that the Coast Guard station in Vancouver Harbour would have remained open because it would have been identified as an integral component of the development of a coordinated Canadian spill preparedness and response regime and an important piece in effective risk mitigation reflective of a "world class" response model.

The Federal government's quest for enhanced standards and practice cannot be taken seriously when there is such a wide disconnect between what the government says and what it does. Canadians are being unduly put at risk as economic resource development takes precedence over environmental protection.

⁴² Office of the Auditor General, 2010 Fall Report of the Commissioner of the Environment and Sustainable Development, http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201012_01_e_34424.html - hd5j

⁴³ February 3, 2013, http://www.oag-bvg.gc.ca/internet/English/osh_20130205_e_37764.html

⁴⁴ February 5, 2013, <http://www.ctvnews.ca/politics/opposition-demands-government-response-to-environment-audit-1.1143386>

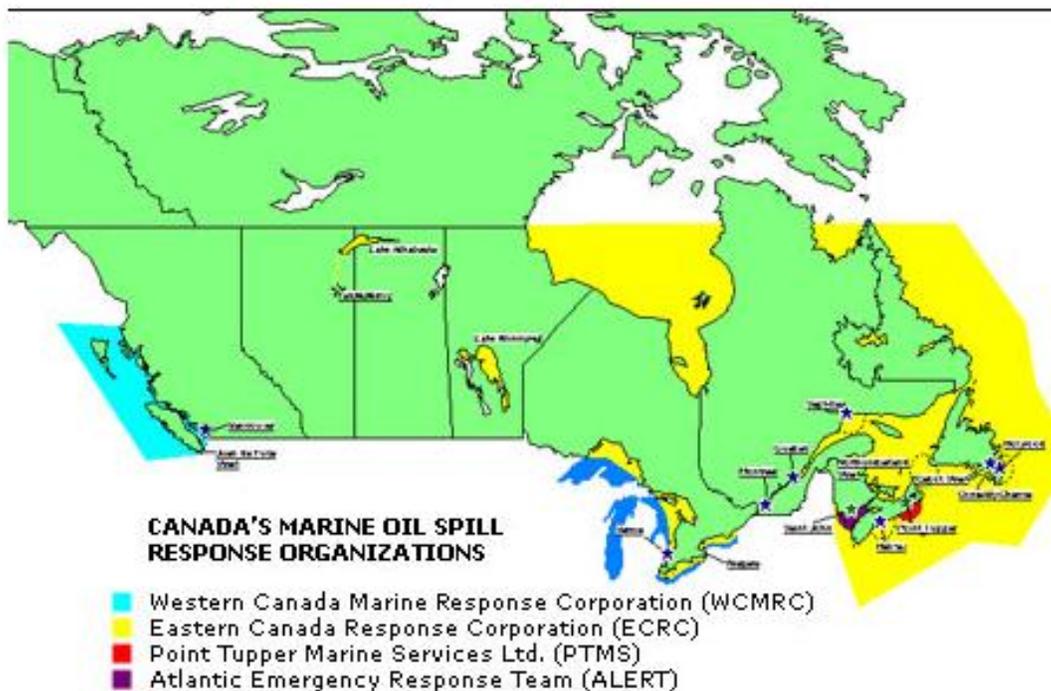
It is hoped that the Tanker Safety Expert Panel does not allow itself to become another working group in a long line of highly qualified professionals in service to a better system that is effectively delayed, or worse, ignored as the Federal government says one thing and does another.

5. Ship-source Oil Spill Preparedness and Response Organizations

Over the past two decades, the responsibility for oil spill preparedness and response has increasingly become a private, for-profit strategy driven by the oil industry because of the increasing, and leading role played by certified Response Organizations in developing plans, purchasing and maintaining response equipment, and taking a leadership role in the response to a spill when it occurs.

There are four RO's currently certified by Transport Canada as illustrated in Map 1 below.

Map 1



Source: Transport Canada

The four Canadian RO's are:

1. Western Canadian Marine Response Corporation (WCMRC)—owned by Kinder Morgan, Imperial Oil, Shell, Chevron and Suncor.
2. Eastern Canada Response Corporation (ECRC)—owned by Imperial Oil, Ultramar, Shell and Suncor.
3. Point Tupper Marine Services (PTMS)—owned by Nustar Energy.
4. Atlantic Emergency Response Team (ALERT)—owned by Irving Oil.

The west coast response area for WCMRC is identified by light blue. ECRC responds to all navigable water pollution events in the geographic region east of the Rockies as illustrated by the yellow area, except for Point Tupper, Nova Scotia, as identified by red, and St. John, New Brunswick as identified by purple.

The Minister of Transport grants a certification to an RO within a geographic region and for a specified quantity of oil up to 10,000 tonnes—or slightly more than 70,000 barrels.⁴⁵

Certification depends upon the RO filing a response plan with Transport Canada. The response plan must conform to the Regulations, which outline procedures, equipment and resources to be used by the RO for a spill of a specified quantity of oil within its geographic area.⁴⁶

5.1 Canadian Certified Response Organizations Predominantly Foreign Owned and Controlled

There is a certified private sector driven Response Organization regime operating in Canada, but there is not a Canadian certified Response Organization regime. Response Organizations are structured as for-profit entities predominantly controlled by foreign owned multinational oil sector interests. This means that the preparedness and response for Canadian oil spill marine events are essentially determined by the goals and objectives of international multinational oil companies and their responsibility to their shareholders, not determined by the needs of the Canadian public interest.

The obligation of corporate entities to their shareholders is a legal obligation. Given the ownership relationship of certified Response Organizations to oil companies, to think the driving force behind the decisions for spill preparedness and response is anything other than a profit maximizing goal on behalf of shareholder interests taking precedence over the Canadian public interest, would be naïve.

The ownership relationships between certified Response Organizations—and the foreign multinational parents they report to—are detailed below.

⁴⁵ <http://www.bp.com/conversionfactors.jsp>

⁴⁶ <http://www.tc.gc.ca/eng/marinesafety/oep-ers-regime-ros-771.htm>

1. **Western Canada Marine Response Corporation (WCMRC)** states that the company's primary shareholders are the 4 major oil companies (Imperial Oil, Shell Canada, Chevron and Suncor) and Kinder Morgan pipelines.⁴⁷
Kinder Morgan Pipelines—or Kinder Morgan Canada, is the wholly owned subsidiary of Kinder Morgan Inc. based in Houston, Texas.⁴⁸
Imperial Oil is a Canadian subsidiary of the US-based company ExxonMobile headquartered in Irving, Texas and holds 69.6% of Imperial Oil's shares.
Shell Canada is 100% owned by Royal Dutch Shell plc, based in The Hague, Netherlands.
Chevron Canada owned 100% by Chevron Corp headquartered in San Ramon, California.
Suncor, a Canadian based multinational headquartered in Calgary, Alberta.
2. **Eastern Canada Response Corporation (ECRC)** shareholders are Imperial Oil, Ultramar, Shell and Suncor. The ownership of Imperial, Shell and Suncor has been outlined above.
Ultramar is owned 100% by Valero Energy Corp., an international oil refiner and distributor of gasoline products based in San Antonio, Texas.
3. **Point Tupper Marine Services (PTMS)** is owned by Nustar Energy.
Nustar Energy is owned by Nustar GP Holdings LLC. Nustar is an asphalt refiner, pipeline and marketer of refined products based in San Antonio, Texas.
4. **Atlantic Emergency Response Team (ALERT)** is owned by Irving Oil.
Irving Oil is a privately-held regional energy processing, transporting, and marketing company headquartered in Saint John, New Brunswick, Canada, with U.S. marketing operations in Portsmouth, New Hampshire.

ROs have a schedule of fees for their annual membership. These fees fund their operations and profit. These fees are related to the capital and operating costs of standing-in-wait for a spill event, including a return on investment (7.58% in 2013) available for distribution to their shareholders.⁴⁹ When a spill event occurs and a certified Response Organization responds, there is a schedule of fees related to the cost of clean up.⁵⁰

All certified ROs therefore earn a revenue stream and return on investment from their contracts with members for standing in wait, and a predetermined revenue stream agreed to in advance for services to be rendered for response when a spill occurs. Earnings

⁴⁷ FAQ's WCMRC http://www.wcmrc.com/?page_id=1784

⁴⁸ Kinder Morgan Annual Report, page 28. No mention of the WCMRC is made in Kinder Morgan annual report. http://www.kindermorgan.com/investor/KMI_2012_annual_report_financials.pdf However, WCMRC mentions that Kinder Morgan Pipelines is a part owner of WCMRC. http://www.wcmrc.com/?page_id=1784

⁴⁹<http://www.wcmrc.com/wp-content/uploads/2011/07/2013-Fee-Justification-Document.pdf>

⁵⁰ http://www.ecrc.ca/en/response_rates/marine.asp

potential is maximized by more, rather than less, clean up and remediation response—unless the clean up and remediation is being paid for by a member who is also an owner of the RO. There is no business disincentive for an RO in an arms length spill response experience to want to minimize clean up and remediation, whereas the business incentive for an RO contracted in a non-arms length spill event—contracted to clean up a spill by its owner(s)—has a built in incentive to “under-respond”, particularly if insurance resources have been exhausted. When a conflict of interest exists, the incentive is to mitigate the impact on its owners, not to mitigate the impact of the spill event.

In addition to the non-arms length conflict of interest features of the current regime, is the fact that the Canadian regime is not Canadian owned or controlled. As crude oil production and transport increases, the prospect is for certified ROs to become increasingly owned and operated by foreign interests including National Oil Companies of foreign governments (See Section 5.3 below). The profits from RO activities will increasingly flow out of the Canadian economy along with ownership and control.

For the reasons outlined above, it is in the public interest that certified RO companies in Canada be owned and operated at arms length to oil sector and marine shipping interests. It is also important that the financial returns from developing best practices, “standing-in-wait”, and responding to a spill when it occurs be re-channeled into the Canadian economy such that the guaranteed profits of ROs be returned to the Canadian public. Finally, it is imperative that the first and foremost guiding principle of decision making for RO activities be the Canadian public interest, not the private interest of predominantly foreign owned and controlled oil companies and their shipping subsidiaries.

Response Organization activities should be standardized and provided through a newly created Federal Crown Corporation to own and operate all Response Organization activity within Canadian waters in a manner that reflects the public interest needs of the Canadian environment, economy and society and on behalf of the Canadian public.

An arms-length, transparent entity, for and on behalf of the public will ensure this entity is charged with developing best practices and “world-class” standards implemented in a consistent and coordinated fashion throughout the nation.

5.2 Response Organization Ownership and Potential for Conflict of Interest

As long as the relationships between ROs and the companies they serve are arms-length, the harmonizing forces of competing interests as reflected in transparent market based relationships would be expected to function in a relatively effective manner. If the companies served by ROs are owned by ROs a fundamental self-disciplining force within the market system is violated. The transparency of, and accountability to, market-negotiated decisions are no longer provided. The business needs of the integrated party will tend to take precedent over the public interest needs of the society it purports to serve.

If an RO is owned, or partially owned, by the company, or companies, who may be responsible for the pollution event, conflict of interest, and opportunities for distorted decision-making arises. These distorted decisions will likely not be transparent, but they could be significant and undermine the protection of the public interest that expects to be served by an efficient and effective response regime.

The ownership of certified RO's rests with pipeline operators, oil producers and refiners as explained above. Although the direct links of these owners to shipping interests are not fully presented in this paper, there is at least one relationship that can be discussed to illustrate the potential for conflict of interest under the MLA. That is, Exxon Mobil, Imperial Oil's parent also holds a wholly owned shipping subsidiary SeaRiver Maritime, established to segregate ExxonMobil's shipping interests after the ExxonMobil spill in 1989.

As a result, a potential conflict of interest could arise when WCMRC is called to a spill event caused by a tanker owned by a sister company to one of its owners—Imperial Oil. Should Northern Gateway and/or Kinder Morgan's expansion of Trans Mountain be approved, a further entrenchment of undesirable conflict of interest forces would follow since both projects have more direct links between RO ownership and direct shipping interests.

As stated above, as a fundamental principle Canada's preparedness and response to oil spill events should be established, first and foremost, with the public interest of Canadians as the guiding principle, not the corporate bottom line of the oil interests they serve. All Response Organizations should be owned and controlled within a structure that can—in law and practice—put the Canadian public interest first. Foreign ownership and a for-profit focus cannot do this.

To further illustrate the concern, the detailed ownership structure proposed by Enbridge for Northern Gateway is described below.

5.3 Northern Gateway's Ownership

Enbridge Inc. has filed an Application with the NEB for approval to build and operate Northern Gateway—an oil export pipeline, a condensate import pipeline and related storage and marine facilities in Kitimat, BC. Enbridge has stated its intention for Northern Gateway to provide preparedness and response for terrestrial and marine oil spill events and in order to fulfill this, plans to obtain certified RO status from Transport Canada.⁵¹

⁵¹ Northern Gateway Hearings, National Energy Board, Transcript Volume 134, Lines 1858 – 1872. [https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/628981/916156/International Reporting Inc. - 13-02-05 - Volume 134 - A3F2R3?nodeid=915803&vernum=0](https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/384192/620327/628981/916156/International%20Reporting%20Inc.%20-%2013-02-05%20-%20Volume%20134%20-%20A3F2R3?nodeid=915803&vernum=0)

Should Northern Gateway gain approval, and as part of its spill preparedness and response plans, undertake efforts to establish itself as a certified RO, the owners of Northern Gateway would then become owners of the certified RO and stand to profit from terrestrial and marine spill events. This possibility makes it important to understand the intended ownership structure of Northern Gateway and how Northern Gateway's plans would result in a certified RO being owned in whole, or in part, by not only foreign multinational oil companies, but also the National Oil Companies of the Chinese government. It is also important to understand how these companies are linked to shipping companies with oil tanker interests.

With Northern Gateway's proposed RO we open the opportunity for foreign National Oil Companies—tantamount to Crown Corporations here in Canada—claiming ownership rights through involvement with Northern Gateway to the response regime. Canada does not have a national oil company to pursue the public interest needs of energy security at reasonable price in Canada, although it allows foreign governments to operate their “crowns” in Canada to provide energy security at reasonable prices for their citizens.

Canada has elected to increasingly privatize pollution spill preparedness and response. Now Canada is contemplating approval of a structure for response to oil spills that gives to foreign government owned and controlled companies power over the design and implementation of a “world-class” marine spill preparedness and response system.

Northern Gateway is a limited partnership formed under the laws of Alberta, with Enbridge Inc. as its first limited partner and Northern Gateway Pipelines Inc. as general partner. Enbridge, on behalf of the project, developed a process for potential shippers where they could partially finance Enbridge's predevelopment costs, including its public review process with the NEB. Northern Gateway raised \$100 million from ten Funding Partners who paid \$10 million each. Northern Gateway has since made cash calls which have raised this amount to an estimate of \$15 million each. As part of their rights for providing this funding, potential shippers can elect to invest and become limited and general partners in the project.⁵²

Not all the Funding Partners have identified their involvement in the project but the majority have, including Sinopec owned by China Petrochemical Corporation one of the three largest oil companies owned by the Chinese government, Nexen Inc. owned by the Chinese Overseas Oil National Company (COONC) another of China's three main national oil companies owned by the Chinese government, MEG Energy (owned in part by CNOOC), Cenovus Energy Inc., Suncor Energy Marketing Inc., French multinational Total E&P Canada Ltd., and Japanese multinational INPEX Canada Ltd.

Sinopec, an oil producer in Canada, has extensive refining and distribution interests in China, including retail gasoline stations. Sinopec also has an investment in extensive shipping assets. It has not been made clear whether or not Sinopec related ships will be

⁵² Application to the National Energy Board Joint Review Panel, Volume 1 and Hearing Transcripts, September 2013.

docking at Kitimat, but it is possible. As a result there is a very possible undisclosed conflict of interest situation that could arise if Northern Gateway owns and operates a Response Organization that responds to a spill event caused by a tanker owned, in whole or in part, by one of its general and limited partners.

It should also be clear that any other Chinese National Oil Company, such as CNOOC, and potentially Petro China which has expressed an interest in becoming an owner of Northern Gateway, could have a conflict of interest because one of its sister companies' shipping assets experience an oil spill event. It should also be pointed out that the China P&I Club insuring the Chinese Merchant Navy, is also owned and operated by the Chinese government through the Ministry of Agriculture.⁵³

INPEX also has a wholly owned shipping company, INPEX Shipping. Although it is not readily apparent if the company plans to have its own oil tankers or condensate tankers call at the Kitimat marine facility, if it does its relationship in the Northern Gateway project the RO could lead to conflict of interest situations as well.

Clearly, the ownership and control of certified ROs as contemplated by Enbridge is not in the public interest.

⁵³ The China P&I is also known as the China Ship-owners Mutual Assurance Association established in 1984. http://www.er.ethz.ch/publications/MAS_Thesis_Yunhui_Wang.pdf page 18.

Author's Bio

Robyn Allan has held executive positions in the private and public sectors including President and CEO of the Insurance Corporation of British Columbia, Vice-President Finance for Parklane Ventures Ltd., and Senior Economist for B.C. Central Credit Union.

Recently Ms. Allan prepared written evidence and was an expert witness on economic and insurance issues before the National Energy Board Joint Review Panel assessing the proposed Northern Gateway Pipeline Project.

Ms. Allan was the Economic and Financial Adviser to the Barrett Commission of Inquiry into the Quality of Condominium Construction in British Columbia. She has taught Money and Banking, Public Finance and Micro and Macro Economics at the university level as well as written numerous articles for newspapers and magazines including the Globe and Mail, Financial Post, Business in Vancouver and Enterprise Magazine. Her first book, *Quest for Prosperity: The Dance of Success* was published in 1995. She holds a Masters Degree in Economics from the University of British Columbia.

Ms. Allan is currently an independent economist.