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West Coast Environmental Law Association

Submission to the British Columbia Ministry of Environment & Climate Change Strategy Regarding its Policy Intentions Paper for Engagement: Phase Two Enhancements to Spill Management in British Columbia

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I. INTRODUCTION

1. West Coast Environmental Law Association ("West Coast") is pleased to provide comments on British Columbia's (BC) Policy Intentions Paper For Engagement: *Phase Two Enhancements to Spill Management in British Columbia* on Spill Response.

2. West Coast was actively engaged in the Phase I consultations regarding BC's proposed spill response rules in 2016.[1]

3. The government's proposed regulations address the important issues of spill preparedness and response within BC. Regulatory action in this area is responsive to the concerns expressed by numerous British Columbians about the need for protection of lands, waterways and communities from spills.

II. OVERARCHING PRINCIPLES AND THEMES

4. West Coast proposes that the following principles must guide spill response management in British Columbia:

    a. **The public must be involved in the planning, approving, and revising of oil spill response plans.** Community and citizen engagement leads to greater accountability and stronger protections, and should include interested individuals and non-governmental organizations, stakeholders from industries such as fishing and tourism, as well as local governments.

    b. **Spill regulations should embody BC's commitment to full implementation of the UN Declaration on the Rights of Indigenous Peoples.** This includes the right of self-determination and the requirement to obtain the free, prior and informed consent of Indigenous nations with respect

[1] See *Oil spills in BC: Will we be ready? A public guide to speaking up about BC's proposed spill response rules* (June 2016). Available online: https://www.wcel.org/publication/oil-spills-bc-will-we-be-ready-public-guide-speaking-about-bcs-proposed-spill-response.

to the transportation of hazardous substances through their territories, and to the preparation and approval of instruments such as Geographic Response Plans.

c. **The polluter must pay for the full extent of environmental damage.** Affected communities and Indigenous nations must play a role in assessing the extent of the damage, including loss of use. The legal standards and knowledge of Indigenous nations must be respected in determining impacts and compensation.

d. **The new legislation must be based on the best available science and Indigenous knowledge, and apply the precautionary principle where knowledge gaps exist.** This means that our spill response plans must be based on our best understanding of the behaviour, toxicity and most effective and least harmful clean-up method for each substance that is transported within BC. This also means that if we don't understand how to clean up a substance, it shouldn't be approved for transportation.

e. **Regulations must be transparent, comprehensive and compulsory.** Spill plans must include detailed instructions for each phase of the clean-up, including coordinating the different spill response authorities. These plans must be open to public scrutiny and comment, and include mandatory timelines and reporting.

f. **Shippers must be able to clean up what they move.** Governments should scrutinize and approve plans, not merely require companies to have them. And shippers must demonstrate that their spill plans are effective before plans are approved. This includes drill testing and public scrutiny. Shippers must be held to a high standard: cleaning up a minimum of 80% of what they have spilled in the case of an oil spill. And large shippers of oil must be required to post a bond sufficient to pay for a worst-case scenario spill.

5. In addition to advocating the above principles, we offer the following submissions in three areas:

   a. Advancing science-based regulatory restrictions on diluted bitumen transport

   b. Provincial authority to regulate spill management and response

   c. The need for the regime to provide effective provincial oversight and approval of spill response plans.

III. RESTRICTIONS ON DILUTED BITUMEN TRANSPORT

6. In late January 2018, the BC government announced its proposal to establish new regulations to improve preparedness, response and recovery from potential spills. At that time the Province signaled its intention to make a regulation under the provincial *Environmental Management Act* that would restrict operators from increasing the amount of diluted bitumen they transport in BC, pending recommendations from the science panel. This independent scientific advisory panel was to determine whether and how heavy oils like tar sands diluted bitumen can be safely transported and cleaned up, if spilled.

7. We note that BC's policy intentions paper does not specifically include this proposal. Instead, through a reference case filed April 26, 2018, BC is seeking direction from the BC Court of Appeal regarding a proposed hazardous substances permitting regime related to heavy oil.

8. We commend BC for its proposals in this area, and subject to direction from the courts, submit that BC should move forward on the proposed permitting regime for increased shipments of heavy oil.

9. Further, BC must not delay in launching of the planned science panel (for example, until the results of the reference case are known). Uncertainties regarding whether and how heavy oils like diluted bitumen can be safely transported or cleaned up remain and must be resolved.

10. Pending recommendations from the science panel, or should the science panel conclude that it is uncertain whether diluted bitumen can be safely transported or cleaned up, the precautionary principle should be applied. Specifically, geographic response plans under the *Environmental Management Act* should not be considered adequate in the absence of evidence that heavy oil can be safely transported and cleaned up.

IV. PROVINCIAL AUTHORITY TO REGULATE SPILL MANAGEMENT AND RESPONSE

Marine Context

11. BC has both the authority and the responsibility to apply its spill response legislation to marine settings. First, subject to unextinguished Aboriginal title, BC has ownership of the waters and seabed between the BC mainland and Vancouver Island, which are among the most heavily trafficked marine areas on this coast. Second, the health of the ocean is critical to the economic, social and environmental health of the province, and to the health of BC residents. Finally, hazardous substances spilt anywhere within the ocean will not respect jurisdictional lines drawn in the water between the provinces and the federal government. All levels of government – provincial, federal and Indigenous - must do their part to protect lands, waters and coastlines.

Specific Provincial Authority

12. BC has the authority to enact environmentally protective legislation within the marine area between mainland BC and Vancouver Island. The Supreme Court of Canada established BC's ownership of the seabed of the Strait of Georgia, Johnstone Strait, Juan de Fuca Strait, and Queen Charlotte Straits in 1984.[2] Ownership of the water column flows from this decision, as provincial lands include the inland waters of a province.[3] Subject to areas of specific federal jurisdiction such as fisheries, shipping and navigation, and to Indigenous jurisdiction, the province has jurisdiction over the area through its constitutional authority to manage public lands.[4]

[2] *Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 SCR 388 at 427 [*Georgia Strait Ref*].

[3] *Ibid* at 440.

[4] *Georgia Strait Ref, supra* note 2 at 392*; Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK) s 92(5) [*Constitution*].

13. Legal ownership of the waters between the mainland of BC and Haida Gwaii remains unresolved; however, the inland waters of the province extend at least to the low-water mark in tidal areas.[5]

14. BC also has the authority to enact legislation with the purpose of protecting the health of BC residents.[6] This is particularly relevant in the context of spill response legislation, because the spill of a hazardous substance in the marine environment could have significant and long-term effects on human health, especially as it is not clear whether it is possible to clean up a spill of diluted bitumen in salt water.

Cooperative Federalism

15. A provincial spill response regime in the marine environment can and should co-exist with federal laws on shipping and spill response. Cooperative federalism, which accepts "the inevitability of overlap between the exercise of federal and provincial competencies," is particularly applicable with respect to environmental legislation.[7]

16. Cooperative federalism is supported by the double aspect doctrine, which recognizes that both federal Parliament and provincial legislatures can adopt valid legislation on the same subject, if it is adopted under a relevant head of power.[8]

17. Validly enacted provincial legislation cannot be rendered inoperative by the mere existence of duplicate or overlapping federal legislation.[9] The doctrine of paramountcy, which provides that a federal law, validly enacted, must override provincial legislation, only applies if there is an "operational conflict" between the federal and provincial laws, meaning that it is either impossible to comply with bot laws, or the provincial law frustrates the purpose of the federal law.[10]

18. Particularly when legislation is in the public interest, the Court should avoid preventing the application of the legislation if there is no conflicting legislation from other levels of government.[11]

19. Cooperative federalism is particularly applicable to environmental legislation. Environmental protection is both an issue of great public importance and an area of shared responsibility between provincial and federal governments.[12] The Supreme Court of Canada has stated that both Parliament and the provincial legislatures have an "all-important duty…to make full use of the legislative powers assigned to

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[5] Linda Nowlan, "Brave New Wave: Marine Spatial Planning and Ocean Regulation on Canada's Pacific" 29 J Env L&Prac 151 at 159; *Georgia Strait Ref, supra* note 2 at 440.

[6] *Constitution*, *supra* note 4, s 92(7); *Schneider v British Columbia*, [1982] 2 SCR 112 at para 60; *Re Bowack* (1982) 2 BCR 216 at 224.

[7] *NIL/TU, O Child & Family Services Society v BCGEU*, 2010 SCC 45 at para 42.

[8] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 30 [*Canadian Western Bank*].

[9] *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 190-91.

[10] *Canadian Western Bank*, *supra* note 8 at para 75.

[11] *Ibid* at para 37.

[12] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 455-56 [La Forest J]; *R v Hydro-Québec*, [1997] 3 SCR 213 at para 59.

them in protecting the environment."[13]

20. The Supreme Court of Canada has stated that "the Constitution should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution."[14]

21. In the context of marine spill legislation, cooperative federalism is even more relevant. Water does not respect constitutional boundaries; a spill in any marine waters, particularly along major shipping routes, is likely to end up on the coast.

22. Given BC's constitutional jurisdiction over environmental issues, and particularly given the potentially catastrophic and far-reaching consequences of a spill in BC's marine environment, the province has both the authority and the duty to enact legislation that will protect the province from hazardous substances.

Interprovincial Undertakings and Section 35

23. The submissions above with regard to collaborative federalism, and the needs and responsibility for all levels of government to do their part to protect land, water and communities from risks associated with spills also apply to pipelines and other interprovincial undertakings.

24. While interprovincial undertakings are within federal jurisdiction, this does not nullify validly enacted provincial legislation that addresses areas of provincial jurisdiction, such as health, safety and environmental protection.

25. The Supreme Court of Canada recently unanimously held that provinces have the constitutional right to restrict importation of goods from each other, as long as the primary aim is not to impede trade.[15] Given that the primary aim of the spill response plan is the protection of the health, and environment, we submit that it is well within the province's right and responsibility.

26. Furthermore, in our submission, the doctrines of interjurisdictional immunity and paramountcy must be considered in the context of section 35 of the *Constitution.*

27. The BC Supreme Court held that "where environmental jurisdictions overlap, each jurisdiction must maintain and discharge its duty to consult and accommodate."[16]

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[13] *Friends of the Oldman Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 63.

[14] *R v Hydro-Québec*, *supra* note 12 at para 116. In this case, the Supreme Court of Canada also stated at para 131: "The situation is really no different from the situation regarding the protection of health where Parliament has for long exercised extensive control over such matters as food and drugs by prohibitions grounded in the criminal law power. This has not prevented the provinces from extensively regulating and prohibiting many activities relating to health. The two levels of government frequently work together to meet common concerns."

[15] *R v Comeau*, 2018 SCC 15.

[16] *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 804 at para 196.

28. This principle supports our submission that interprovincial undertakings and the assertion of federal jurisdiction cannot override constitutional rights or obligations under section 35, including the need for provincial action to address risks to Aboriginal title and rights from spills.

V. OVERSIGHT AND APPROVAL OF GEOGRAPHIC RESPONSE PLANS

29. As noted in the policy intention paper Geographic Response Plans (GRPs) identify sensitive, natural, cultural, and/or significant economic resources at risk from spills of oil or other persistent hazardous material, and describe and prioritize response strategies to minimize impacts to these resources should a spill occur. GRPs are an important complement to spill contingency planning.

30. We propose strengthening the proposed approach in three ways: i) Provincial and Indigenous approval of GRPs; ii) Application of the best available science, Indigenous knowledge and the precautionary principle; iii) Requiring development and approval of GRPs prior to issuance of hazardous substances permits for increased transportation of heavy oil, and other provincial permits.

Provincial and Indigenous approval of geographic response plans

31. The policy intentions paper states BC's intention that: "Ultimately, the ministry will have the authority to determine if/when a given GRP is adequate".

32. However, we note that the *Environmental Management Act* does not presently require provincial approval of GRPs nor establish any test or criteria for determining their effectiveness. **This must change if GRPs are to be an effective tool for protection of natural, cultural and other values**.

33. While the Act allows the minister to order the regulated persons prepare, or to review, update and test GRPs according to approved Terms of Reference (EMA, ss. 91.31(3)(4)), there is no statutory requirement to demonstrate the effectiveness of the proposed plan, nor for the province to withhold approval for a plan that is not, in the opinion of the minister, likely to be effective at protecting natural, cultural or other values.

34. Without such requirements GRPs risk being merely a procedural box to check, rather than fulfilling their policy function. It is not sufficient to rely on the good will of regulated persons to ensure that GRPs will actually be effective at achieving policy goals.

35. West Coast is pleased to see multiple references to 'effective spill management' throughout the intensions paper. This in stark contrast to the vague and misleading 'world-leading spill response' terminology previously used.

36. However, in order for the response plans to be truly effective, we submit that specific minimum standards should be set in regulation. We endorse a recommended minimum of 80% as a reasonable starting point.

37. The 80% minimum standard will create certainty for all stakeholders, including industry. It will provide a standard against which clean up efforts can be measured, and is within the range of clean-up reports from government and industry in past spills.

38. Once a minimum standard is set, significant financial penalties for failing to achieve this standard should also be set. For example, each percentage below the minimum standard should invite an escalating fine.

39. In keeping with the provincial government's commitment to full implementation of UNDRIP, development of the terms of reference for GRPs and their approval should be done jointly with affected Indigenous peoples.
40. In order to avoid gaming the spill and recovery numbers, independent bodies, including local Indigenous peoples should be able to monitor and verify volumes spilled and recovered.

Application of the best available science, Indigenous knowledge and the precautionary principle

41. The focus of GRPs should be on identifying sensitive areas and values in particular geographies at risk from potential spills from transportation (or proposed transportation) of hazardous substances, and the best alternatives for protecting those values.
42. We support the use of advisory committees to inform the development of GRPs to reflect local knowledge and other expertise. However, this approach must be complemented by a statutory or regulatory requirement to use best available science and Indigenous knowledge, and to apply the precautionary principle in developing GRPs.
43. In particular, the EMA should explicitly provide that GRPs may require geographic restrictions on the storage or transportation of hazardous substances, and acknowledge that in some circumstances avoidance (i.e., prohibiting or restricting the transportation of hazardous substances through sensitive areas) may be the best alternative to protecting key values.
44. In the face of scientific uncertainty about whether a hazardous substance may be safely transported through a sensitive area, or effectively cleaned up in the event of a spill, avoidance is the precautionary strategy.
45. Advisory committee involvement, and government-to-government engagement regarding GRPs should proactively address the geographies for which hotspot GRPs must be prepared, and to identify precautionary geographic restrictions or conditions if applicable as an input to planning.
46. Further, as noted above, impacted Indigenous peoples should be involved at a government-to-government level (not merely as part of an advisory committee) in developing the terms of reference and approving GRPs.

Approval of GRPs prior to provincial permitting for new infrastructure

47. The Policy Intentions Paper identifies anticipated time lines to develop linear GRPs for existing transportation corridors, and for identifying areas for localized hotspot GRPs. No timeline is suggested for completing hotspot GRPs.
48. The Policy Intentions Paper does not specifically prioritize GRPs related to new or expanded transportation of hazardous substances.
49. In our submission, both linear and hotspot GRPs for new transportation infrastructure affecting sensitive geographic areas (or otherwise related to increased transportation of hazardous substances affecting such areas) **must be completed and approved** prior to the issuance of other related provincial permits (e.g., proposed hazardous substance permits; approvals authorizing changes in and around a stream under *Water Sustainability Act*, s.11).

50. The *Environmental Management Act* and concomitant amendments to other statutes should be made to achieve this intention.

VI. CONCLUSION

51. West Coast thanks the BC government for the opportunity to present our views. We look forward to seeing a strong spill management response regime enacted into law.