



## **KEEPING OUR COAST CLEAN:**

Frequently asked questions about an oil tanker ban on BC's Pacific North Coast



In November 2015, Prime Minister Trudeau publicly gave Ministers in his Cabinet a mandate to formalize an oil tanker moratorium on the north coast of British Columbia. West Coast Environmental Law has been an outspoken advocate for a legislated oil tanker prohibition on the Pacific north coast for many years, and we have been getting a lot of questions about this issue and its possible implications. This backgrounder addresses many of the frequently asked questions.

## Frequently Asked Questions About A Pacific North Coast Oil Tanker Ban

### 1. What has the federal government committed to?

The Mandate Letters from Prime Minister Trudeau to the Minister of Transport and the Minister of Fisheries, Oceans and the Canadian Coast Guard include the following as a top priority for both Ministries: “formalize the moratorium on crude oil tanker traffic on British Columbia’s North Coast, including the Dixon Entrance, Hecate Strait, and Queen Charlotte Sound.”<sup>1</sup>

### 2. Why is the federal government committing to “formalize” a moratorium – is there already a moratorium in place?

A federal commitment to an oil tanker moratorium on B.C.’s north coast dates back to the government of Prime Minister Pierre Trudeau in the 1970s.<sup>2</sup> However, the moratorium commitment was not enshrined in legislation. The federal government has the legal power to make decisions about the administration of Canada’s internal waters without using legislation, but the limitations of non-legislative approach became apparent when the government of Prime Minister Stephen Harper refused to recognize the commitment to an oil tanker moratorium in the region.<sup>3</sup> The purpose of formalizing a legislated ban is to ensure we have lasting protection from the risks of oil tankers and to remove all doubt about the legal status of the moratorium.

<sup>1</sup> Office of the Prime Minister, “Minister of Fisheries, Oceans and the Canadian Coast Guard Mandate Letter” (November 2015), online: <http://pm.gc.ca/eng/minister-fisheries-oceans-and-canadian-coast-guard-mandate-letter> [“Fisheries and Oceans Mandate Letter”]. See also Office of the Prime Minister, “Minister of Transport Mandate Letter” (November 2015), online: <http://pm.gc.ca/eng/minister-transport-mandate-letter>.

<sup>2</sup> For a summary of the history of the oil tanker moratorium see the article of former Environment Minister David Anderson, “David Anderson: Tanker-ban decision was not taken lightly” The Times Colonist (14 November 2015), online: <http://www.timescolonist.com/opinion/columnists/david-anderson-tanker-ban-decision-was-not-taken-lightly-1.2111348>.

<sup>3</sup> See e.g. Chuck Strahl, “Re: An oil spill would inevitable if tankers allowed on B.C. coast, Letters, Dec. 23” Vancouver Sun (24 December 2010), online: <http://www.canada.com/story.html?id=beb3304a-5a18-4520-92ef-41f358e3ff97>.

### 3. What is the difference between a moratorium and a ban?

Using the common definitions of these words, a moratorium is a temporary prohibition of an activity, whereas a ban prohibits an action altogether. The purpose of a legislated ban is to ensure we have lasting protection from the risks of oil tankers and to remove all doubt about the status of the moratorium.

### 4. What attempts have previously been made to legislate an oil tanker ban?

In 2010, a majority of Parliament passed a (non-binding) motion which stated: "the government should immediately propose legislation to ban bulk oil tanker traffic in the Dixon Entrance, Hecate Strait and Queen Charlotte Sound as a way to protect the West Coast's unique and diverse ocean ecosystem, to preserve the marine resources which sustain the community and regional economies of British Columbia, and to honour the extensive First Nations rights and title in the area."<sup>4</sup>

There have been at least six private members bills in the past eight years that sought to formalize the Pacific north coast oil tanker moratorium in the form of a legislative prohibition under the Canada Shipping Act, 2001 ("CSA 2001")<sup>5</sup>: Bill C-571 (2008 – MP Catherine Bell); Bill C-458 (2009 – MP Don Davies); Bill C-606 (2010 – MP Joyce Murray); Bill C-211 (2011 – MP Fin Donnelly); Bill C-437 (2012 – MP Joyce Murray); and Bill C-628 (2014 – MP Nathan Cullen).<sup>6</sup> None of the private members bills were passed into law by Parliament.

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<sup>4</sup> Motion by Nathan Cullen, 40th Parliament, 3rd Session, Journal No. 112 (7 December 2010), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=3&DocId=4852969>

<sup>5</sup> *Canada Shipping Act, 2001*, SC 2001, c 26, s 165 ["CSA 2001"].

<sup>6</sup> Bill C-571, 39th Parliament, 2nd Session (2008), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3591669> ["Bill C-571"]; Bill C-458, 40th Parliament, 2nd Session (2009), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4131489>; Bill C-606, 40th Parliament, 3rd Session (2010), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4885482> ["Bill C-606"]; Bill C-211, 41st Parliament, 1st Session (2011), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5088572>; Bill C-437, 41st Parliament, 1st Session (2012), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5688488>; Bill C-628, 41st Parliament, 2nd Session (2014), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6699473> ["Bill C-628"].

## 5. What is the rationale for the oil tanker ban?

MP Joyce Murray summed up the rationale for this type of legislation in her introduction of Bill C-437 to Parliament in 2012:

“As this House well knows, Canada’s quality of life is closely connected to the health of our oceans, which are integral to our environmental, social and economic services and capital. I join the majority of British Columbians who believe that transporting oil by supertankers in certain turbulent and hazardous inland coastal waters poses an unacceptable risk to the marine environment, to the communities and the businesses that depend upon that environment, and to all Canadians who share the common heritage of healthy oceans. I am therefore pleased to introduce this bill, which would legislate the long-term Liberal policy of prohibiting supertanker traffic from the waters around Haida Gwaii, in order to protect the Pacific north coast of Canada from oil spills.”<sup>7</sup>

Fisheries and Oceans Canada classifies close to half of the area as “Ecologically or Biologically Significant Areas,” according to criteria adopted by the *Convention on Biological Diversity*.<sup>8</sup>

Canada’s interests in legislating a North Coast oil tanker ban are also economic: industries such as fishing, aquaculture and tourism depend on a healthy ocean. A study from UBC’s Fisheries Centre found that a large scale oil spill could cost local fishermen, the Port of Prince Rupert, BC Ferries and marine tourism operators roughly \$300-million, 4,000 full-time jobs and \$200-million in contribution to GDP over 50 years, not including damage to social, cultural and ecological values. Each year ocean-based industries on the north coast of B.C. generate about \$1.2-billion, provide employment for more than 9,000 people and contribute approximately \$700-million to GDP.<sup>9</sup>

Furthermore, through the Coastal First Nations Declaration and Save the Fraser Declaration,<sup>10</sup> First Nations across British Columbia have already prohibited oil pipeline and tanker proposals such as Enbridge’s Northern Gateway in their territories according to their own laws, and have supported federal legislation implementing an oil tanker ban on BC’s north coast.<sup>11</sup>

<sup>7</sup> Joyce Murray, 41st Parliament, 1st Session, Journal No. 143 (19 June 2012), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5690478>

<sup>8</sup> Clarke, C.L., and Jamieson, G.S. 2006. Identification of ecologically and biologically significant areas in the Pacific North Coast Integrated Management Area: Phase II – Final Report. Can. Tech. Rep. Fish. Aquat. Sci. 2686: v + 25 p.

<sup>9</sup> Hotte, Ngaio, and U. Rashid Sumaila. “How much could a tanker spill cost British Columbians?.” *Environment, development and sustainability* 16.1 (2014): 159-180.

<sup>10</sup> For a backgrounder on these two Indigenous law-based bans, see Jessica Clogg and Josh Paterson, Legal Backgrounder: Save the Fraser Declaration and Coastal First Nations Declaration (December 2012), online: <http://www.wcel.org/sites/default/files/publications/Legal%20comment%20on%20Save%20the%20Fraser%20Declaration.pdf>

<sup>11</sup> See e.g. Yinka Dene Alliance and Coastal First Nations, “BC First Nations Offer Support to Trudeau Government in Fulfilling Federal Commitment to Pacific North Coast Oil Tanker Moratorium” (16 December 2015), online: <http://www.marketwired.com/press-release/bc-first-nations-offer-support-trudeau-government-fulfilling-federal-commitment-pacific-2082547.htm>





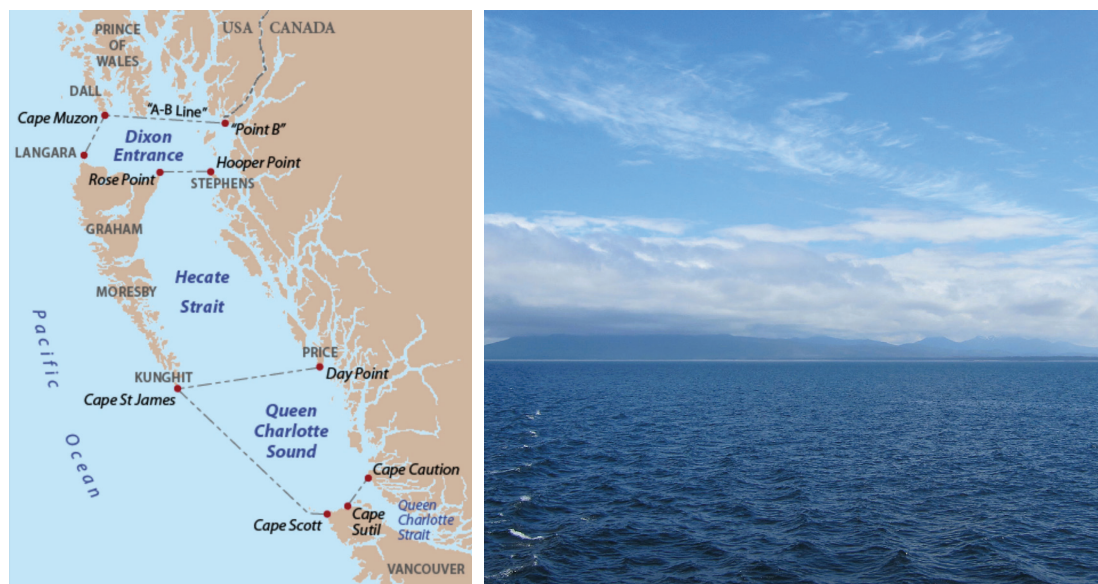
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## 6. What legal tool could be used to formalize an oil tanker ban?

A statutory amendment is the strongest way to formalize a Pacific north coast oil tanker ban because, once passed into law, it could not be altered without further legislative amendment in Parliament. It would also be the most public manner of formalizing the ban because it would proceed through the Parliamentary process for enacting legislation. All previous private members bills sought to amend the *Canada Shipping Act, 2001* to introduce an oil tanker prohibition zone on the Pacific north coast. Other options do exist for formalizing the moratorium, for example a Regulation made by the Governor in Council, however such options are weaker because they could be more easily reversed by a future government, with little public debate.

## 7. What geographic area would the oil tanker ban cover?

The Ministerial Mandate Letters direct the Ministers to: “formalize the moratorium on crude oil tanker traffic on British Columbia’s North Coast, including the Dixon Entrance, Hecate Strait, and Queen Charlotte Sound.”<sup>12</sup> A strong oil tanker ban should apply to this entire area, consistent with the Ministerial Mandate Letters. A map of the area is attached as a schedule to Bill C-606,<sup>13</sup> and the area is also shown by the dotted lines in the map below.



## 8. What type of vessels would be covered by the ban?

Previous private members tanker ban bills have sought to prohibit the transport of oil “in an oil tanker.” This approach is reasonable because it would focus on the key issue of bulk oil transport, and it would not prohibit the transport of fuel products for use in coastal communities by vessels that are not oil tankers. Existing regulations under *CSA 2001* define an “oil tanker” as: “a vessel constructed or adapted primarily to carry oil in bulk.”<sup>14</sup> Previous private members tanker ban bills have sought to use this definition, and attempted to add further clarity by defining “in bulk,” based on existing Transport Canada Guidelines,<sup>15</sup> to mean carrying oil “in a hold or tank that is part of the structure of the vessel, without any intermediate form of containment.”<sup>16</sup>

<sup>12</sup> Fisheries and Oceans Mandate Letter, *supra*.

<sup>13</sup> Bill C-606, *supra*.

<sup>14</sup> *Vessel Pollution and Dangerous Chemicals Regulations*, SOR/2012-69, s 1; *Environmental Response Arrangements Regulations*, SOR/2008-275, s 1.

<sup>15</sup> Transport Canada, *Guidelines for Reporting Incidents Involving Dangerous Goods, Harmful Substances, and/or Marine Pollutants – TP 9834 E (2009)*.

<sup>16</sup> See e.g. Bill C-628, *supra*.

## 9. What type of oil would be covered by the ban?

The Ministerial Mandate Letters prioritize the formalization of a moratorium on “crude oil tanker traffic” (emphasis added). It is too early to tell whether this is just a reference to the historical moratorium or whether it indicates an intention on the part of the federal government to limit the prohibition to oil tankers carrying certain types of oil only (i.e. crude oil). A strong oil tanker moratorium would be broadly defined to ensure that vessels carrying bulk oil of any kind are prohibited, regardless of the semantics of the type of oil. This could be best accomplished by broadly defining “oil” in the ban. There are already existing definitions of “oil” in federal legislation that are quite broad and could provide guidance. For example, *CSA 2001* section 165 defines “oil” as: “petroleum in any form, including crude oil, fuel oil, sludge, oil refuse and refined products.”<sup>17</sup> This is also the language used in one version of the private members tanker ban bill.<sup>18</sup>

The moratorium’s rationale of protecting the region’s ecosystems, communities and economy from the risk of oil spills applies equally to refined and crude oil, thus there is a need for a clear and strong prohibition that applies to any and all bulk oil shipments. This approach would also provide business certainty, eliminate ambiguity, and avoid needless expense of time and money by potential future proponents of proposals involving oil tanker traffic in the region. This is important because, in addition to the Enbridge Northern Gateway project, which proposes to ship diluted bitumen via tanker, several other very preliminary proposals exist in the region that would involve tanker transport of upgraded or refined oil.<sup>19</sup> While these proposals have not entered into regulatory review and their viability is open to debate, they at least indicate a potential for future proposals for tanker shipments of upgraded or refined oil in the region that ought to be included within the scope of the oil tanker ban.

The previous private members tanker ban bills have excluded gas from the definition of oil, and similarly the federal tanker moratorium commitment refers to oil and not gas. It is worth noting that there are some existing tanker shipments of condensate to BC’s north coast.<sup>20</sup> Existing federal statutes have generally excluded condensate from the definition of “oil” and instead included it in the definition of “gas”.<sup>21</sup>

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<sup>17</sup> *Canada Shipping Act, 2001*, SC 2001, c 26, s 165.

<sup>18</sup> Bill C-571, *supra*.

<sup>19</sup> See e.g. Kitimat Clean Ltd., online: <http://kitimatclean.ca/>.

<sup>20</sup> Living Oceans Society, *Shipping on the British Columbia Coast* (2011), online: <http://www.livingoceans.org/sites/default/files/ShippingBriefing.pdf>

<sup>21</sup> See e.g. First Nations Oil and Gas Moneys Management Act, SC 2005, c 48, s 2.

## 10. Would there be any exceptions to the oil tanker ban?

It is important that an oil tanker ban not prevent coastal communities in BC and Alaska from obtaining necessary shipments of fuel. On the other hand, an oil tanker ban should be carefully worded so that companies cannot use fuel shipments to coastal communities as a loophole to ship oil for other purposes.

Assuming an approach is adopted whereby the prohibition applies only to transporting oil in "oil tankers," then the prohibition would have no impact on shipments of fuel products to coastal communities by vessels that are not oil tankers (e.g. vessels carrying barrels of fuel). Nonetheless, most previous private members tanker ban bills have included a clarification provision stating that, "for added certainty", the prohibition: "does not apply in respect of the transportation of gasoline, aviation fuel, diesel oil or fuel oil that is intended for use in coastal and island communities in Canada."<sup>22</sup> If this type of provision is to be included in a legislated ban, it is worth considering whether: (a) Alaskan communities ought to also be included in the scope of coastal communities; and (b) further clarification or limits on this exemption would be appropriate to ensure that it cannot be exploited as a loophole to transport oil products in bulk.

## 11. Does Canada have the jurisdiction under domestic law to impose an oil tanker ban?

Yes, the federal government has legislative jurisdiction over navigation and shipping pursuant to section 91(10) of the Constitution.<sup>23</sup> The *Canada Shipping Act, 2001* is the main federal law governing shipping. One of its listed objectives is to protect the marine environment from damage due to navigation and shipping activities.<sup>24</sup> The *CSA 2001* applies to Canadian vessels operating in all waters wherever located, and to all vessels operating in Canadian waters, which, as Transport Canada says, includes all vessels "from canoes and kayaks to cruise ships and tankers."<sup>25</sup>

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<sup>22</sup> See e.g. Bill C-606, *supra*.

<sup>23</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(10).

<sup>24</sup> *CSA 2001*, *supra*, s 6 (c).

<sup>25</sup> Transport Canada, "Canada Shipping Act, 2001" (2012), online: <https://www.tc.gc.ca/eng/marinesafety/rsqa-csa2001-menu-1395.htm>



## 12. Does Canada have the jurisdiction under international law to impose an oil tanker ban?

Yes, the federal government has jurisdiction to impose a tanker ban under international law, pursuant to the United Nations Convention on the Law of the Sea ("UNCLOS"), also known as the "Constitution for the oceans."<sup>26</sup> Canada played a lead role in the development of this international treaty, including negotiating the "Arctic exception" clause in UNCLOS, giving international legal recognition to Canada's unilateral action in passing the *Arctic Waters Pollution Prevention Act in 1972*.<sup>27</sup> UNCLOS came into force in 1982. Canada ratified the treaty in 2003.

This would not be the first time Canada has acted to protect its waters from oil tankers. In the 1980s Canada passed regulations limiting oil tankers in the waters within Head Harbour Passage, New Brunswick, due to navigational risks and the value of fisheries and aquatic bird resources. (The regulations were later rescinded when the US withdrew a proposal for an oil refinery in the area.<sup>28</sup>)

### a. An oil tanker ban is consistent with UNCLOS, the Law of the Sea

An oil tanker ban law can be crafted to align with Canada's support for freedom of navigation, consistent with environmental protection and coastal state security, building on our longstanding leadership in developing the law of the sea.

All states that have ratified UNCLOS have a general obligation to protect and preserve the marine environment.<sup>29</sup> States also have a duty to prevent ocean pollution – UNCLOS says they "shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection."<sup>30</sup>

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<sup>26</sup> UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, online: [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) ["UNCLOS"].

<sup>27</sup> R.S.C. 1985, c. A-12. See McRae, Donald M., and D. J. Goundrey. "Environmental jurisdiction in Arctic waters: the extent of Article 234." *U. Brit. Colum. L. Rev.* 16 (1982): 197.

<sup>28</sup> Oil Carriage Limitation Regulations, S.O.R./82-244 revoked by S.O.R./87-268.

<sup>29</sup> UNCLOS, Article 192.

<sup>30</sup> UNCLOS, Article 194.

UNCLOS codifies six maritime zones, which are stated in Canadian law in the federal *Oceans Act*.<sup>31</sup>

1. **Internal Waters** (all waters landward of a coastal state's jurisdictional coastline)
2. **Territorial Sea** (0–12 nautical miles)
3. **Contiguous Zone** (12–24 nautical miles)
4. **Exclusive Economic Zone** (12–200 nautical miles)
5. **Continental Shelf** (12–200 nautical miles, but can be farther under certain circumstances)
6. **High Seas** (the area beyond the outer limit of a coastal state's continental shelf)

UNCLOS provides guidance for states' rights and responsibilities in these maritime zones. A state has the greatest amount of jurisdiction over internal waters and decreasing rights as the zones extend further out to sea.

The waters of the North Coast between Haida Gwaii, Vancouver Island, and mainland BC are claimed by Canada as historic internal waters.<sup>32</sup> These waters include Dixon Entrance, Hecate Strait, and Queen Charlotte Sound.

Each coastal State has full sovereignty over its internal waters as if they were part of its land territory, and can therefore regulate those waters as they wish. However, UNCLOS establishes an exception that creates a right of innocent passage through internal waters "which had not previously been considered as such."<sup>33</sup> Some observers note the United States maintains that a right of innocent passage exists through the waters between Haida Gwaii and coastal B.C.<sup>34</sup>

The right of innocent passage is one of the oldest rules of public international law. UNCLOS codifies the right to allow for the passage of vessels through the territorial waters of another state,<sup>35</sup> as long as "it is not prejudicial to the peace, good order or security of the coastal State."<sup>36</sup> Vessels may exercise this right for the purpose of proceeding to and from internal waters or ports.

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<sup>31</sup> *Oceans Act*, SC 1996, c 31.

<sup>32</sup> Robert Hage, "Legal Aspects of an Oil Tanker Ban: Bill C-211 as a Case Study", in *Making oil and water mix : oil tanker traffic on Canada's west coast*. Ottawa, ON.: Macdonald-Laurier Institute, 2012.

<sup>33</sup> UNCLOS, Article 8(2) reads: "Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."

<sup>34</sup> Robert Hage, "Legal Aspects of an Oil Tanker Ban: Bill C-211 as a Case Study", in *Making oil and water mix : oil tanker traffic on Canada's west coast*. Ottawa, ON.: Macdonald-Laurier Institute, 2012.

<sup>35</sup> UNCLOS, Article 17.

<sup>36</sup> UNCLOS, Article 45.



UNCLOS allows signatory states, such as Canada, to adopt laws and regulations that impact the right of innocent passage in historic internal waters and in the territorial sea as long as the laws relate to one of eight categories, including: safety and the regulation of marine traffic<sup>37</sup> and environmental protection/pollution prevention.<sup>38</sup>

**b. Canada does not need approval from the International Maritime Organization (IMO) for a legislated ban but may wish to seek complementary international designations**

The ban will apply to internal waters solely under domestic jurisdiction, so approval from the IMO is not required. However, Canada should consider seeking complementary designation of the area by the IMO, a specialized agency of the United Nations whose slogan is "Safe, secure and efficient shipping on clean oceans."<sup>39</sup> The IMO is responsible for measures to improve the safety and security of international shipping and to prevent marine pollution from ships.

<sup>37</sup> UNCLOS, Article 21(1)(a).

<sup>38</sup> UNCLOS, Article 21(1)(f).

<sup>39</sup> International Maritime Organization, online: <http://www.imo.org/en/Pages/Default.aspx>.

The IMO recommends that governments establishing routeing systems entirely within their territorial sea should designate them in accordance with the criteria established by IMO and submit them to IMO for approval.<sup>40</sup> IMO routeing measures are more likely than domestic measures to be accessible to international shipping companies; only IMO approved routes will be published in “Ships Routeing” which is the definitive publication on the topic.

Designation is therefore desirable under both domestic and international law. This is the route other states have chosen. For example, in 2003, the New Zealand government passed Marine Protection Rules Part 190: Mandatory Ships Routeing.<sup>41</sup> The Rules give effect in domestic law to two mandatory areas to be avoided (ATBA) adopted by the IMO. ‘Areas to be avoided’ is one of the mandatory ships’ routeing measures adopted by the IMO to protect sensitive marine environments from the risks, principally of marine oil spills, posed by shipping operations. The rules adopted in New Zealand instruct the owners, the charterers and masters of ships to avoid the defined areas.



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<sup>40</sup> IMO, General Provisions on Ships Routeing Para 3.16

<sup>41</sup> Maritime New Zealand, “Marine Protection Rules – Part 190 Mandatory Ships Routeing”, online: <http://www.maritimenz.govt.nz/Rules/Rule-documents/Part190-marine-protection-rule.pdf>



### 13. How would an oil tanker ban impact existing marine planning and protection initiatives on BC's North Coast?

Formalizing an oil tanker ban through legislation would complement the many initiatives now underway to protect key ecological processes and better manage human activities in the North Pacific Ocean. Years of work have been devoted to comprehensive marine planning in British Columbia, particularly through the Marine Planning Partnership (MaPP) marine use plans developed by First Nations in partnership with the Government of British Columbia.<sup>42</sup> The MaPP plans create zones in the ocean, similar to land use zones, and set the direction for sustainable economic development and stewardship of British Columbia's coastal marine environment. The MaPP plans note that First Nations oppose oil tanker traffic as an ocean use which is incompatible with their preferred future for the region.

Years of work have also gone into designation of marine protected areas (MPAs), whose primary goal is to protect biological features. Governments are working to designate a representative network of MPAs, guided by the 2014 Canada-BC Marine Protected Area Network Strategy. Completing the network will help Canada meet its legal commitment to protect at least 10 percent of its coastal and marine areas.<sup>43</sup> The risk of oil pollution from tankers poses a threat to MPAs. A legislated oil tanker ban would enhance full implementation of marine plans and completion of the MPA network on BC's biologically rich north coast. Harmony exists between these various planning, protection and legislative initiatives.

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<sup>42</sup> Marine Planning Partnership, [mappocean.org](http://mappocean.org).

<sup>43</sup> The Mandate Letter for the Minister of Fisheries, Oceans and the Canadian Coast Guard calls upon the Minister to: "Work with the Minister of Environment and Climate Change to increase the proportion of Canada's marine and coastal areas that are protected – to five percent by 2017, and ten percent by 2020 – supported by new investments in community consultation and science." This direction conforms with the obligations Canada assumed as a signatory to the *Convention on Biological Diversity* (CBD), most recently with the Aichi Targets. CBD "COP 10 – Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity. Nagoya, Japan 18–29 October 2010. Decision X/2. Strategic Plan for Biodiversity 2011–2020," (United Nations Environment Programme), 2010. Aichi target 11 calls on states to protect at least 10 per cent of their coastal and marine areas.

## 14. What would be the effect of an oil tanker ban on Enbridge Northern Gateway?

In 2014 Northern Gateway obtained two certificates from the National Energy Board that, if they survive ongoing legal challenges and all the conditions are met, constitute a federal approval for Northern Gateway to construct an oil pipeline, a condensate pipeline, a marine terminal and related infrastructure between Bruderheim, Alberta, and Kitimat, British Columbia.<sup>44</sup> The Northern Gateway proposal depends on tankers being able to ship oil products through the waters of BC's north coast, so a legislative tanker ban on such shipments would make the project unviable.

It is worth noting that Northern Gateway has not been able to advance despite its federal certificates, thus an oil tanker ban could conclusively put an end to the Northern Gateway proposal and protect the region from any similar future oil pipeline and tanker proposals. Northern Gateway is not legally able to construct its proposed project at present because it has not met necessary preconditions in the certificates, including failure to obtain supply contracts. This is due in part to the fact that Northern Gateway is defending a barrage of ongoing legal challenges to its federal approval brought by First Nations, environmental and labour groups, which reflect deep opposition to the project by First Nations and Canadians. Northern Gateway's certificates are due to expire by December 31, 2016, unless it begins construction.

## 15. Will Enbridge Northern Gateway seek compensation from Canada for an oil tanker ban?

Some observers have stated that Northern Gateway may seek compensation from the Canadian government when an oil tanker moratorium is formalized.<sup>45</sup>

While analysis of this issue would depend on the type of compensation claim and the circumstances, there are many hurdles to such a compensation claim. Here are some of the principal counterarguments that such a claim could face:

- Northern Gateway's Certificates are not a property right sufficient to ground a compensation claim, rather they constitute a preliminary, conditional go-ahead to proceed in seeking further necessary approvals.

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<sup>44</sup> National Energy Board, Certificates OC-060 and OC-061 (18 June 2014) ["Certificates OC-060 and OC-061"].

<sup>45</sup> See e.g. Gary Mason, "Killing Northern Gateway Comes with a Steep Cost" *Globe and Mail* (20 November 2015), online: <http://www.theglobeandmail.com/globe-debate/killing-northern-gateway-comes-with-a-steep-cost/article27375968/>

- Passing a law prohibiting oil tankers on BC's north coast is not an expropriation or taking of Northern Gateway's interests, rather it constitutes legitimate regulation of general application, in the public interest.<sup>46</sup>
- If Northern Gateway stays on track for the expiry of its Certificates due to missed deadlines, it will be challenging to argue that an oil tanker ban caused it a loss that would require compensation because, even absent an oil tanker ban, the Northern Gateway project has so far failed to move forward. By July 1, 2016, Northern Gateway must have proven firm supply contracts accounting for 60 percent of the capacity of both the proposed oil and condensate pipelines in order to begin construction.<sup>47</sup> As of December 2015, Northern Gateway confirmed it has no firm supply contracts at all, citing uncertainty connected to ongoing legal challenges.<sup>48</sup> As noted earlier, Northern Gateway's Certificates are due to expire by December 31, 2016, unless it begins construction.
- It is worth noting that the federal government is able to legislate bars to domestic compensation claims against the government of Canada for changes to the statutory scheme, and it has done so in other circumstances.<sup>49</sup>
- If Northern Gateway wished to make a claim in an international context, which would be subject to hurdles generally similar to those described above, it would need to overcome the additional obstacle of establishing standing. While there are provisions in international investment agreements allowing foreign companies or investors to seek compensation from the Canadian government if standards set out in the agreement are breached, a claimant on behalf of Northern Gateway would need to demonstrate that it was legally entitled to invoke the provisions of such a treaty. Northern Gateway Pipelines Limited Partnership, the business organization that holds the Certificates, is composed of two Canadian corporations: Northern Gateway Pipelines Inc. and Enbridge Inc.

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<sup>46</sup> Canada has made this type of argument on a number of occasions in the international context to defend legislative actions of the federal or provincial governments from challenges by investors under the North American Free Trade Agreement. See e.g. Canada's arguments in defence of Quebec's legislated fracking moratorium in the St. Lawrence River: *Lone Pine Resources Inc. v. Government of Canada*, Canada's Response to Notice of Arbitration (27 February 2015), ICSID Case No UNCT/15/2 (Ch. 11 Arbitration), online: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=UNCT/15/2&tab=DOC>.

<sup>47</sup> Certificates OC-060 and OC-061, conditions 2, 20-21.

<sup>48</sup> Northern Gateway Pipelines Inc. letter to National Energy Board (21 December 2015), online: [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/384192/620327/2398286/2902512/A74893-1\\_Letter\\_Providing\\_Update\\_on\\_Conditions\\_20\\_and\\_21\\_-\\_A4X1V5.pdf?nodeid=2902951&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/384192/620327/2398286/2902512/A74893-1_Letter_Providing_Update_on_Conditions_20_and_21_-_A4X1V5.pdf?nodeid=2902951&vernum=-2)

<sup>49</sup> See e.g. *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd Supp), s 111; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988, c 28, s 131; *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, SC 1987, c 3, s 128.



West Coast is a non-profit group of environmental law strategists and analysts dedicated to safeguarding the environment through law. We believe in a just and sustainable society where people are empowered to protect the environment and where environmental protection is law. For more than 40 years, we have played a role in shaping BC and Canada's most significant environmental laws, and have provided support to citizens, First Nations, and communities on practically every environmental law issue imaginable.