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***West Coast Environmental Law Association Submission to Transport Canada
Regarding Formalization of the Pacific North Coast Oil Tanker Moratorium***

September 30, 2016

Dear Sirs/Mesdames,

Re: Submission to Transport Canada Tanker Moratorium Engagement Process

I write on behalf of West Coast Environmental Law Association to provide submissions in response to the following question posed by Transport Canada in its public engagement for the formalization of a Pacific north coast oil tanker ban:

What do you believe are the most important issues the Government should address in its plan to formalize a crude oil tanker moratorium?

Please find enclosed a West Coast Environmental Law publication entitled *Keeping Our Coast Clean: Frequently asked questions about an oil tanker ban on BC's Pacific North Coast*. We adopt the points in *Keeping Our Coast Clean* for the purpose of providing comments on the moratorium, and in this letter we provide further detail and specificity in response to Transport Canada's engagement question above. This letter is divided into six key issues addressing: the legal mechanism for the moratorium, the duration of the moratorium, the moratorium's geographic scope, the definition of vessels covered by the moratorium, the definition of oil covered by the moratorium, and the inappropriateness of any exemptions from the moratorium.

1) Legislation is the appropriate legal mechanism for the moratorium

Recommendation summary: The oil tanker moratorium should be legislated through an Act of Parliament. We propose an amendment to the Canada Shipping Act, 2001.

Perhaps the most crucial component of an oil tanker moratorium is the legal mechanism that formalizes it. In our view, legislating an oil tanker moratorium through an Act of Parliament is essential in order to ensure that the moratorium is clear, transparent and effective. To see why this is the case, one need only look to the history of the oil tanker ban on BC's north coast.

The Honourable David Anderson, a former Liberal Member of Parliament and federal Minister of Transport, Minister of Environment, and Minister of Fisheries and Oceans, recounts that a federal ban on oil tankers on BC's north coast was first affirmed in 1971 by the government of Prime Minister Pierre Trudeau. The tanker ban referred to by Mr. Anderson is distinct from the voluntary tanker exclusion zone and the moratorium on BC offshore oil and gas exploration; Mr. Anderson is clear that the 1971 announcement marked the beginning of the "longstanding ban on crude-oil-carrying tankers from the waters off Canada's north-west coast."¹

However, the oil tanker ban was not enshrined in legislation, with the obvious weakness that it did not bind subsequent administrations. In the words of Mr. Anderson, the oil tanker ban "has been honoured by every subsequent prime minister, Stephen Harper excepted."² In this context it is unsurprising that, between 2008 and 2014, at least six private member's bills were put forward by various Liberal and NDP Members of Parliament that sought to amend the *Canada Shipping Act, 2001* in order to legislate an oil tanker ban on BC's north coast (all but one of which remained outside the Order of Precedence when Parliament dissolved).³ In addition, a majority of Parliament clearly supported the enactment of a legislated oil tanker ban in 2010 when it passed a Motion stating:

That, in the opinion of the House, 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.⁴

¹ David Anderson, "Tanker Ban Decision Was Not Taken Lightly" *The Times Colonist* (November 2015), online: <http://www.timescolonist.com/opinion/columnists/david-anderson-tanker-ban-decision-was-not-taken-lightly-1.2111348>.

² *Ibid.*

³ Bill C-571, *An Act to amend the Canada Shipping Act, 2001*, 2nd Sess, 39th Parl, 2008; Bill C-458, *An Act to amend the Canada Shipping Act, 2001*, 2nd Sess, 40th Parl, 2009; Bill C-606 *An Act to amend the Canada Shipping Act, 2001*, 3rd Sess, 40th Parl, 2010; Bill C-211, *An Act to amend the Canada Shipping Act, 2001*, 1st Sess, 41st Parl, 2011; Bill C-437, *An Act to amend the Canada Shipping Act, 2001*, 1st Sess, 41st Parl, 2012; Bill C-628, *An Act to amend the Canada Shipping Act, 2001 and the National Energy Board Act*, 2nd Sess, 41st Parl, 2014.

⁴ House of Commons, *Journals*, 40th Parl, 3rd Sess, No 112 (7 December 2010) (Motion by Nathan Cullen).

The foregoing illustrates that the need to legislatively protect BC's north coast from oil tankers has long been advocated by legislators. A meaningful oil tanker moratorium must be legislated in order to ensure that it binds current and future governments. Legislating the oil tanker moratorium by an Act of Parliament will subject the moratorium to rigorous Parliamentary debate, and ensure that no changes can be made to the moratorium without further open public debate. Enacting the oil tanker moratorium would provide the transparency, clarity and certainty that are essential for the moratorium to be effective and meaningful.

As set out in *Keeping Our Coast Clean*, we propose an amendment to the *Canada Shipping Act, 2001* as the preferable means of enacting the oil tanker moratorium. This was the approach adopted in the private member's bills referenced above. The key criterion with regard to the legal mechanism for the moratorium is that it be enacted by Parliament.

2) Minimum geographic scope of the moratorium is defined in Mandate Letters

Recommendation Summary: The minimum geographic scope for the moratorium should be the entirety of Dixon Entrance, Hecate Strait and Queen Charlotte Sound.

We adopt the direction in the Prime Minister's Mandate Letter to the Minister of Fisheries, Oceans and the Canadian Coast Guard regarding the minimum geographic scope of the moratorium: the Minister is 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*" (emphasis added).⁵ Any less than this minimum area would be inconsistent with the direction of the Prime Minister, and would seriously undercut the purpose of the moratorium in protecting the Pacific north coast's environment and economy from the risk of catastrophic oil spills.

We note that Transport Canada's *Discussion Paper on Improving Marine Safety and the Formalization of a Moratorium in Northern BC* (the "Transport Canada Discussion Paper") affirms the importance of considering Canada's international law commitments when

⁵ 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>.

determining the geographic scope of the moratorium.⁶ At pages 9-12 of *Keeping Our Coast Clean* we set out our view that formalizing a strong moratorium covering the entirety of Hecate Strait, Dixon Entrance and Queen Charlotte Sound would be consistent with Canada's international law commitments.

3) The moratorium should have no expiry date

Recommendation summary: There should be no sunset clause in the moratorium, rather the moratorium, once enacted, should endure unless and until it is altered through a process of rigorous and open Parliamentary debate.

A legislated oil tanker moratorium should have no sunset clause or expiry date. Oil tanker traffic inherently involves a risk of seriously harmful spills that is simply not acceptable in the unique and important waters of BC's north coast, now or in the future.

Prime Minister Justin Trudeau, at the time leader of the Liberal opposition, stated to Parliament in 2014: "Mr. Speaker, UBC researchers have told us that a single tanker spill from the northern gateway would be catastrophic for B.C.'s pristine north coast and its economy. A large spill would cost \$10 billion to clean up, and would wipe out over 4,000 full-time B.C. jobs."⁷ In addition to pure economic considerations, the waters of BC's north coast are of immeasurable value from a biodiversity standpoint; for example 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*.⁸

The special ecological and economic significance of BC's northern waters demands reliable, lasting protection from the inherent risk of spills posed by oil tanker traffic, indeed this is the very rationale of the moratorium. The purpose for the moratorium commitment in the Liberal Party's 2015 platform is "to ensure that ecologically sensitive areas and local economies are protected from the potentially devastating impacts of a spill."⁹

⁶ Transport Canada, *Discussion Paper on Improving Marine Safety and the Formalization of a Moratorium in Northern BC* (July 2016), online: <http://www.letstalktransportation.ca/crude-oil-tanker-moratorium> at page 7 ["Transport Canada Discussion Paper"].

⁷ *House of Commons Debates*, 41st Parl, 2nd Sess, No 105 (17 June 2014) at 6990 (Justin Trudeau).

⁸ 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.

⁹ Liberal Party, "Real Change: Protecting Our Oceans", online: <https://www.liberal.ca/realchange/trudeau-announces-plan-to-protect-canadas-oceans/> ["Protecting Our Oceans"].

Consequently, any expiry date for the moratorium would be arbitrary and fundamentally inconsistent with the moratorium's rationale.

4) The moratorium should apply to vessels transporting oil in bulk as cargo

Recommendation summary: The moratorium should prohibit the transport of oil in an oil tanker, within the geographic area discussed above. "Oil tanker" should be defined as "a vessel constructed or adapted primarily to transport oil as cargo in a hold or tank that is part of the structure of the vessel, without any intermediate form of containment."

A legislated oil tanker moratorium should prohibit the transport of oil in an oil tanker within the geographic area discussed above. It is therefore necessary to address both the categories of vessel the moratorium will cover (the definition of "oil tanker") and the categories of product the moratorium will cover (the definition of "oil"). This section of our submission addresses the former of these two issues, while the subsequent section addresses the latter. We advocate for defining the vessels to which the moratorium applies in a manner that captures vessels intended to transport oil in bulk as cargo, while allowing smaller fuel shipments to coastal communities.

In considering the vessels to which the moratorium could apply, the Transport Canada Discussion Paper excerpts the following definition from the Schedules of the *Marine Liability Act*:

Ship means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.¹⁰

This definition of "ship" is used in both the *International Convention on Civil Liability for Oil Pollution Damage* (the "Civil Liability Convention"), and the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (the "Compensation Fund Convention"), which are adopted into law by the *Marine Liability Act*.¹¹ The *Marine Liability Act* also, in keeping with the requirements of the *Civil Liability Convention*, imposes insurance obligations on vessels carrying more than 2,000 tonnes of oil

¹⁰ *Marine Liability Act*, SC 2001, c 6 ["*Marine Liability Act*"], Schedule 5, Article I.

¹¹ *Ibid*, ss 48 and 57, Schedules 5 and 6.

as cargo.¹² In citing these provisions, the Transport Canada Discussion Paper thus states that vessels captured by the moratorium could include any vessel, such as a barge, carrying over 2,000 gross tonnes of oil.¹³

For reference, it is also helpful to consider other definitions of “oil tanker” in domestic and international law. The following definition of “oil tanker” appears in two different Regulations under the *Canada Shipping Act, 2001*:

“oil tanker” means a vessel constructed or adapted primarily to carry oil in bulk in its cargo spaces and includes a combination carrier, an NLS tanker and a gas carrier that is carrying a cargo or part cargo of oil in bulk.¹⁴

This definition closely reflects the definition of “oil tanker” in the *International Convention for the Prevention of Pollution from Ships (MARPOL)*.¹⁵ A third Regulation under the *Canada Shipping Act, 2001* adopts by reference the following definition of “oil tanker” that appears in the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978*:

“oil tanker” means a ship constructed and used for the carriage of petroleum and petroleum products in bulk.¹⁶

The *Canada Shipping Act, 2001* and its regulations do not define “in bulk.” Parts 6 and 7 of the *Marine Liability Act* define “in bulk” to mean “in a hold or tank that is part of a ship’s structure, without any intermediate form of containment.”¹⁷

Drawing on these various definitions, we propose that the moratorium prohibit oil tankers defined as follows:

“oil tanker” means a vessel constructed or adapted primarily to transport oil as cargo in a hold or tank that is part of the structure of the vessel, without any intermediate form of containment.

¹² *Ibid*, ss 48, 55(1) and Schedule 5, Article VII.

¹³ Transport Canada Discussion Paper, *supra* at page 7.

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

¹⁵ *International Convention for the Prevention of Pollution from Ships*, online: <http://www.mar.ist.utl.pt/mventura/Projecto-Navios-I/IMO-Conventions%20%28copies%29/MARPOL.pdf> at Annex I, Regulation 1

¹⁶ *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978*, online: <https://cil.nus.edu.sg/rp/il/pdf/1978%20STCW%20Convention%20Amended%20by%202010%20Manila%20Amendments-pdf.pdf> at Annex, Regulation I; adopted by reference in *Marine Personnel Regulations*, SOR/2007-115.

¹⁷ *Marine Liability Act*, *supra*, ss 47(1) and 91(1)

Our proposed definition of “oil tanker” provides a clear approach that is consistent with the existing definitions in federal and international law, while striking an appropriate balance between the various societal considerations addressed in the Transport Canada Discussion Paper. We submit that the proposed definition would ensure the moratorium applies to vessels intended to transport oil in bulk as cargo, while allowing smaller shipments of oil products for use in northern communities. It would also exclude vessels carrying oil products not as cargo but rather for the vessel’s own use (e.g. fuel).¹⁸

We note that the Transport Canada Discussion Paper also addresses the option of a weight-based threshold to defining vessels captured by the moratorium, namely carriage of more than 2,000 metric tonnes of oil, while noting that this would capture some existing shipments in the region.¹⁹ We also understand that some of our northern colleagues propose a volume-based threshold for the moratorium. We are not opposed to adding a weight- or volume-based threshold to the proposed definition above in a manner that increases the scope of vessels subject to the moratorium, with the caveat that reasonable allowances must be made for existing fuel shipments to coastal communities.

5) Types of oil to which the moratorium applies should be broadly defined

Recommendation summary: The definition of “oil” which the moratorium prohibits from transportation in an oil tanker should mirror the definition in the Canada Shipping Act, 2001, namely “petroleum in any form, including crude oil, fuel oil, sludge, oil refuse and refined products.”

The Transport Canada Discussion Paper notes that the definition of products covered by the moratorium is a key issue to be determined. In our view, “oil” ought to be broadly defined to ensure that vessels carrying bulk oil of any kind are prohibited by the moratorium, regardless of the type of oil. At the time of the Prime Minister’s Mandate Letter direction to formalize a Pacific north coast moratorium on “crude oil tanker traffic”, the only oil tanker proposal before federal regulators in the region was Enbridge’s Northern Gateway proposal for crude oil tankers. Since the release of the Prime Minister’s Mandate Letters, two new proponents have filed applications with the Canadian Environmental Assessment Agency

¹⁸ The *Canada Shipping Act, 2001*, SC 2001, c 26 [“*Canada Shipping Act*”], distinguishes between “cargo” and “fuel” – see ss 167(1)(a) and 190(1)(c).

¹⁹ Transport Canada Discussion Paper, *supra* at page 7.

proposing projects that would introduce regular tanker shipments of refined oil products in the region.²⁰

In this context, we submit that applying the moratorium to tankers carrying refined and crude oil is in keeping with the stated purpose of the moratorium, namely “to ensure that ecologically sensitive areas and local economies are protected from the potentially devastating impacts of a spill.”²¹ A major spill of refined oil would have catastrophic impacts on the important ecosystems and local economies that rely on BC’s northern waters, thus refined oil products should be included in the scope of the moratorium.

We recommend that this could be accomplished by turning to the definition of oil used in section 165 of the *Canada Shipping Act, 2001*:

“oil” means petroleum in any form, including crude oil, fuel oil, sludge, oil refuse and refined products.²²

Defining oil in this way would ensure the moratorium applies to oil tankers carrying any type of oil that poses serious risks to communities and ecosystems on BC’s north coast. Again, it would not capture smaller shipments of oil products that are not transported in an “oil tanker” as discussed above.

Alternative recommendation: While we disagree with the approach suggested in the Transport Canada Discussion Paper that would generally exclude refined oil products from the moratorium, if the government proceeds with this approach then in our view the definition of oil must at minimum capture the following elements:

“Oil” means

- (a) any persistent hydrocarbon oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, and
- (b) any hydrocarbon, except coal and gas, that may be extracted or recovered from surface or subsurface deposits, including deposits of oil sand, bitumen, bituminous sand, oil shale and other types of deposits, whether or not treated to render it suitable for transportation.

²⁰ Canadian Environmental Assessment Agency, “Kitimat Clean Refinery Project” (September 2016), online: <http://www.ceaa.gc.ca/050/details-eng.cfm?evaluation=80125>; Canadian Environmental Assessment Agency, “Pacific Future Energy Refinery Project” (August 2016), online: <http://www.ceaa.gc.ca/050/details-eng.cfm?evaluation=80127>.

²¹ Protecting Our Oceans, *supra*.

²² *Canada Shipping Act, supra*, s 165.

The Transport Canada Discussion Paper focuses its considerations on defining oil for the purposes of the moratorium in a manner that would generally exclude refined oil products. While we disagree for the reasons stated above, if this approach is to be adopted then we submit that the moratorium must at a minimum adopt a definition of oil that explicitly captures persistent oil and any hydrocarbons (excluding coal and gas) that occur naturally in the earth, whether or not treated to render them suitable for transportation. In other words, we would submit that the definition of oil covered by the moratorium include *both* of the approaches to defining oil addressed in the Transport Canada Discussion Paper, as discussed below. Again, this is in the alternative to our preferred approach of adopting the more comprehensive definition of oil in section 165 of the *Canada Shipping Act, 2001*.

The Transport Canada Discussion Paper proposes two definitions of oil for the purposes of the moratorium. The first definition is drawn from the *Compensation Fund Convention* at Schedule 6 of the *Marine Liability Act*, which contrasts “crude oil” with “fuel oil” by providing the following definition:

Crude Oil means any liquid hydrocarbon mixture occurring naturally in the earth whether or not treated to render it suitable for transportation. It also includes crude oils from which certain distillate fractions have been removed (sometimes referred to as “topped crudes”) or to which certain distillate fractions have been added (sometimes referred to as “spiked” or “reconstituted” crudes).²³

The second approach in the Transport Canada Discussion Paper proposes distinguishing between persistent and non-persistent oil, due to the view that persistent oil generally poses a higher environmental risk. This approach is presumably drawn from the *Civil Liability Convention* at Schedule 5 of the *Marine Liability Act*, which contains the following definition:

Oil means any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship.²⁴

Both of these definitions differ somewhat from the approach previously adopted in the private member’s tanker ban bills, which largely mirror the definition of “oil” in section 2 of the *Canada Oil and Gas Operations Act*.²⁵ For example, MP Joyce Murray’s Bill C-437 reads:

“Oil” means
(a) crude petroleum, regardless of gravity, produced at a well-head in liquid form, and

²³ *Marine Liability Act, supra*, Schedule 6, Article 1.

²⁴ *Marine Liability Act, supra*, Schedule 5, Article I.

²⁵ *Canada Oil and Gas Operations Act*, RSC 1985, c O-7, s 2

(b) any other hydrocarbons, except coal and gas, including hydrocarbons that may be extracted or recovered from surface or subsurface deposits, such as deposits of oil sand, bitumen, bituminous sand or oil shale, and includes oil that has been treated to render it suitable for transportation.²⁶

This definition appropriately covers not only “liquid” hydrocarbons as discussed in the Transport Canada Discussion Paper, but also hydrocarbons such as bituminous deposits that are arguably semi-solid if not treated for transportation. We support this approach because it avoids any potential ambiguity about the application of the moratorium to bitumen products such as those proposed to be transported by Enbridge’s Northern Gateway proposal.

In considering the various definitions above we submit that, at a minimum, the moratorium must cover all persistent oils, and for clarity the definition of oil should also explicitly include all hydrocarbon mixtures occurring naturally in the earth (other than coal and gas). While there are different possible approaches to this definition, below we offer one approach that draws from the various definitions above:

“Oil” means

- (c) any persistent hydrocarbon oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, and*
- (d) any hydrocarbon, except coal and gas, that may be extracted or recovered from surface or subsurface deposits, including deposits of oil sand, bitumen, bituminous sand, oil shale and other types of deposits, whether or not treated to render it suitable for transportation.*

For further clarity, it may be advisable to add a detailed distillation-based component to the definition of persistent oil, along the lines of what is set out at footnote *viii* of the Transport Canada Discussion Paper.²⁷

In summary, it is our view that the moratorium ought to apply to any oil product carried in an oil tanker, and the existing definition of “oil” in section 165 of the *Canada Shipping Act, 2001* can be used or adapted for this purpose in the moratorium. However if, as suggested in the Transport Canada Discussion Paper, the government proceeds with a less comprehensive definition of oil for the moratorium, then we submit that at a minimum the moratorium must cover the transport in an oil tanker of all persistent oil and, for clarity, any

²⁶ Bill C-437, *An Act to amend the Canada Shipping Act, 2001*, 1st Sess, 41st Parl, 2012.

²⁷ Transport Canada Discussion Paper, *supra*, page 8.

hydrocarbon occurring naturally in the earth other than coal or gas, whether or not treated for transportation. In that regard, we propose the italicized definition above.

6) No exemptions from the moratorium

Recommendation summary: Exemptions from the moratorium are not appropriate and would be unnecessary if our recommended approaches are adopted.

Our proposed approach to the moratorium, namely prohibiting the transport of oil in an oil tanker, would not prevent smaller shipments of fuel products to coastal communities in vessels that are not oil tankers. Therefore no exemptions from the moratorium are necessary. In order to ensure a strong and comprehensive moratorium, there should be no exceptions to its application.

Conclusion

We thank Transport Canada for the opportunity to provide comments on the content of the federal oil tanker moratorium. We look forward to remaining engaged on this issue and would be pleased to offer any further support or input as the Minister of Transport moves towards his stated commitment of formalizing the moratorium before the end of 2016.

Yours truly,

A handwritten signature in black ink, appearing to read 'Gavin Smith', written in a cursive style.

Gavin Smith
Staff Counsel, West Coast Environmental Law Association