



Octobre 12, 2018

To TC.OPPLegis-LegisPPO.TC@tc.gc.ca

Re: Comments – Potential Legislative amendments to strengthen marine environmental protection and response

The Shipping Federation of Canada, incorporated by an Act of Parliament in 1903, is the national voice for shipowners, operators and agents of ocean ships trading at ports across Canada, from the Atlantic to the St. Lawrence and Great Lakes to the West Coast and the Arctic.

As a first overall comment, we note that the discussion paper states that the *Oceans Protection Plan's goal is to protect Canada's coasts in a modern and advanced way that ensures environmental sustainability and promotes safe, responsible shipping*. It seems that one dimension is missing here: Actions under the OPP should promote safe, responsible, and efficient shipping. Efficiency in maritime transportation is at the heart of a strong Canadian economy and will minimize the environmental footprint of shipping by optimizing the fluidity of vessels and cargo movements.

3.1 and 3.2: Enable marine ecosystem protection and enabling rapid intervention by Transport Canada to address marine safety and environmental risks

Under this section of the discussion paper, Transport Canada is looking at strengthening its regulatory authority to minimize the impacts of navigation on at-risk whales.

In our opinion, when assessing what actions are needed to minimize the negative interactions between whales and commercial ships, it is important to keep in mind that one fits all solution will most likely not be the best approach in all cases.

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First, regulations are not the *be all end all* – and management tools such as voluntary measures implemented on an industry-wide basis have a proven record in mitigating threat in an efficient, adaptative and on a relatively swift basis compared to regulatory tools. The voluntary measures implemented under the umbrella of the Port Vancouver ECHO program – which continues to deliver, for a second-year in a row, noise reduction from ships in critical areas of the southern resident killer whale habitat – illustrate what can be achieved through well-designed, adaptative and industry-led voluntary measures. In the same manner, effective voluntary measures to protect the beluga and other marine mammals in the St. Lawrence Estuary have been in place since 2013, as a result of a closed partnership involving industry, science, environmental groups and regulators.

Second, a distinction must be made between management actions to reduce the risk of ship strikes versus reducing underwater noise from ships. While there is a body of knowledge indicating that limiting the speed of vessels to 10 knots can efficiently reduce the risk of lethal ship strikes (when moving shipping lanes is not an option), there are still important knowledge gaps which must be addressed when it comes to reducing the impacts of underwater noise from vessels on at-risk whales.

For examples, there is still a lack of data on noise levels from individual ships and how these relate to different factors. *Noise output for a particular speed will depend on a number of factors that vary in the short term (e.g., loading and trim), the medium term (e.g., fouling or propeller damage) as well as fixed factors such as propeller type and hull design.*¹ More data is also needed to address the existing level of uncertainty as to which vessels have consistently high noise output for their class and size. In this context, a regulatory approach to address underwater noise from ships might look good on paper but it will most likely not lead to the most efficient solution in a medium to long term. Regulations are static and do not allow for efficient real-time learning and the implementation of an adaptive approach – which is critically needed when it comes to underwater noise from ships. Furthermore, regulating through the imposition of finite and inflexible speed limits has the strong potential to stifle the focus on developing ship design solutions (which should be the end goal).

Having said that, there is however one common element when it comes to ship strikes and underwater noise, i.e., effective management actions must be based on knowledge of the spatial and temporal location of whales. In recent years, some of the at-risk whales have been moving in an unpredictable way in Canadian waters (as a result of climate change, change in prey location, etc.) and their movements cannot be contained in a square box, unless one would consider drawing square boxes over ever larger areas. This situation calls for adaptive management tools – including dynamic mitigation approaches - that are more closely linked to the actual presence of whales. Therefore, effective management actions in Canadian waters require adequate and sustained investment in a range of whale detection technologies, well suited to each regional situation.



Finally, we also respectfully submit that the need for “rapid” intervention by Transport Canada should be prefaced by the need for continuous effective monitoring and detection of whales. In our opinion, the situation of the North Atlantic Right Whales (NARW) in the Gulf of St. Lawrence in 2017 illustrates this statement. Indeed, it is our understanding that there were already indications of NARW presence in the Gulf back in 2015 and 2016, which was raised by the regional science community working on those whales for over 40 years. Providing “emergency” regulatory powers without the proper sustained focus and investment on detection and monitoring of population movements will not be an efficient management approach.

3.2 Enhance deterrence and enforcement

When considering approach to deterrence and enforcement, it is important to situate the conversation within its factual context. The data available on the rate of accidents and incidents and recent reports demonstrate that we do have a history of safe shipping in Canada and vessels operating in Canadian waters are indeed governed by a strong regulatory and safety framework.

An effective compliance framework is important. However, we are certainly not facing blatant disregard for regulation across those shipowners operating in Canadian waters. For example, the rate of compliance with the speed reduction in the Gulf of St. Lawrence to protect NARW is well over 98%.

Having said that, any consideration of increasing administrative monetary penalties should be assessed against the fact that *AMPS were designed as essentially a simple small-claims –type mechanism; it is inherently administrative and lacks at least some of the legal protections available in Court prosecutionⁱⁱ*. We look forward to further details on the proposed increases in order to better inform our comments.

Furthermore, consideration should be given to establishing a mechanism for directing funds received as a result of administrative monetary penalties, court orders and voluntary payments for shipping-related infractions to a dedicated maritime transportation fund to be administered by Transport Canada. This fund would support marine sustainable transportation projects, including, for example, investments in whale detection technologies. There are precedents for such funds, including the Environmental Damages Fund established by Environment Canada in 1995 and we look forward to further working with Transport Canada to develop the framework for a dedicated Sustainable Maritime Transportation Fund, as per above.



4.0 Strengthen Environmental Response

4.1 Enable early intervention during a pollution incident

The discussion paper focus mostly on early intervention – without addressing an overarching key structural issue which is the need for a strong (and centralized) maritime casualty decision-making authority, which would not only ensure that decisions are made in a timely manner, but also that the management of an oil spill response operation is devoid of undue political interference.

As mentioned in previous submission, we believe that the challenges of coordinating the roles of various government agencies in any response effort, along with managing external factors such as public concern, political pressure and media involvement, are still very much present and this situation leads to inefficient spill response operations. These challenges were also highlighted in the phase two report of the Tanker Safety Expert Panel (“A Review of Canada’s Ship-Source Spill Preparedness and Response, Setting the Course for the Future”), which noted the following with respect to managing a maritime casualty:

Managing a marine casualty in Canada is a complex endeavour. It can involve multiple federal, provincial/territorial, and municipal authorities . . . The sheer number of authorities involved and the different powers that may be brought to bear in a marine casualty can make decision-making very complex, challenging, and, at times, slow – all of which increase the risk of spills . . . In some instances, the distribution of powers and authorities can lead to “decision-making by committee: as the authorities involved debate over the best course of action and who has the jurisdiction or power to make key decisions . . . This approach may not ensure the timeliness of decisions that is required to ensure the best possible outcome. (Pages 81 to 84)

With regard to the timelines of the actions and the CCG’s ability to intervene earlier, one must ensure that the primary role and expertise of shipowners (and their P&I clubs) in providing effective response to a spill is not diminished by the type of amendments being considered.

4.3 Support more effective response to oil spills in water: Alternative Response Measures

We support the introduction of a legislative authority to enable the use, on a case-by-case basis, of alternative response measures such as burning and spill-treating agents.

This legislative authority already exists in Canada for an oil spill from offshore drilling platforms and we expect that a well-informed legislative risk-assessment framework



could also be developed for the use of alternative response measures in the event of an oil spill from ships.

Although the safety records of maritime transportation in Canada is strong and data indicates that *fewer than 2% of commercial marine incidents and accidents in Canadian waters involved a know release of pollutants into the environmentⁱⁱⁱ*, it is important to ensure that there is access to a broad range of response tools – on a case by case basis – to enable the most effective spill response.

5 Modernizing Canada’s Ship-source Oil Pollution Fund

At this stage, we are not in position to submit comment on this section – as we need more time to conduct a proper analysis.

The scope of the various proposals contained in this discussion paper is quite broad and the timeline for producing comments was rather limited. The challenges that stakeholders are facing in providing meaningful inputs is even greater considering that the federal government is also holding several other consultation initiatives with overlapping timelines, under the OPP.

In this context, we are submitting the above preliminary comments in order to meet the required timeline while we look forward to Transport Canada extending consultations to ensure that subsequent comments can be equally fully considered.

Your sincerely,

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ⁱ *Reducing underwater noise from large commercial ships: Current status and future directions*, Journal of Ocean Technology 9(1):65-83, April 2014

ⁱⁱ DMSPLA newsletter, Issue 2, September 6, 2018.

ⁱⁱⁱ Report from the Council of Canadian Academies, commissioned by the Clear Sea Center for Responsible Marine Shipping, *Commercial Marine Shipping Accidents: Understanding the Risks in Canada*, 2016