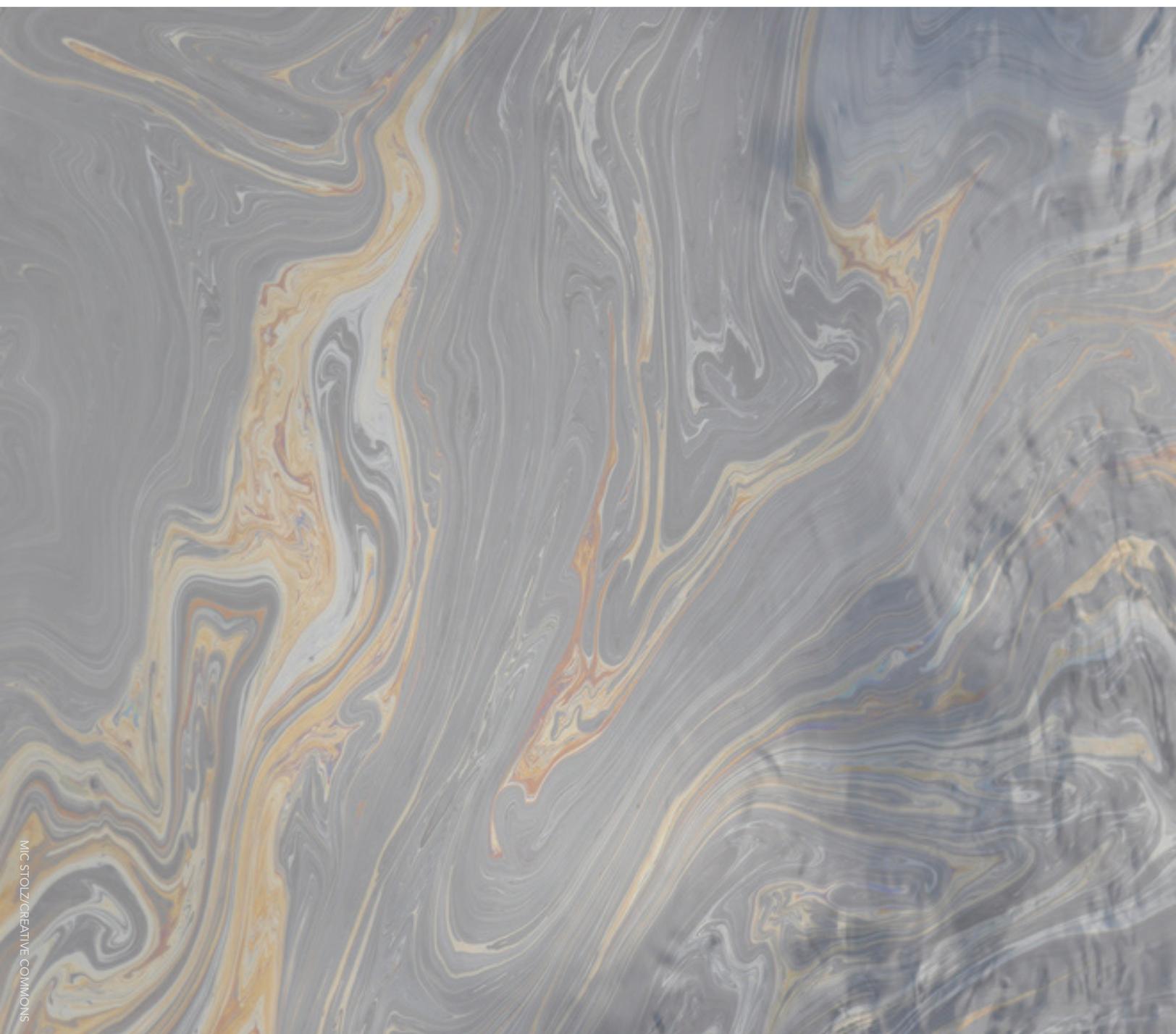


OIL SPILLS IN BC: WILL WE BE READY?

A public guide to speaking up about BC's proposed spill response rules



MIC STOLZ/CREATIVE COMMONS



1. Spill response in BC is changing

The BC Government is changing the way we plan for and respond to spills of hazardous goods in our province. In May 2016, a new law was passed, amending the *Environmental Management Act* that governs spill planning and response. The Ministry of Environment is now consulting stakeholders and the public on the regulations that will implement the proposed new framework.

SPEAK UP ABOUT SPILL RESPONSE
Submit your comments until June 30th, 2016 at:
<http://engage.gov.bc.ca/spillresponse/>

BC communities are at risk from toxic spills of hazardous materials that criss-cross our province by road, rail and ship every day. Our current spill response framework is spotty, unplanned, under-resourced, poorly trained and rarely drilled. The BC Government's move to improve the framework is therefore both overdue and welcome. A strong spill preparedness and response framework is critically important to protecting public safety and environmental health.



A strong framework would protect communities and the environment as much as possible with the right resources and plans in place; be transparent, accountable and inclusive of the citizens it is intended to protect and the First Nations in whose territory it operates; and ensure that polluters pay for rather than direct planning, response, recovery and compensation.

Unfortunately, as it is currently envisioned, the proposed new framework fails to meet these criteria in important ways. The BC Government is poised to hand over control of pollution response entirely to industry, from planning through to clean-up. This would abdicate government's fundamental responsibility to ensure the safety of communities, and would be entirely unaccountable to stakeholders, citizens and First Nations.

The proposed framework also offers nothing to protect us from tar sands spills: the technology to clean up sunken bitumen simply doesn't exist, and no amount of regulation will change that. The new framework cannot, therefore, be used to justify approval of the Kinder Morgan or Enbridge pipeline proposals, or any other new pipeline to transport heavy oil.

There are two fundamental problems with the proposed framework:

- Government is poised to hand over control of pollution response entirely to industry
- The proposed framework offers nothing to protect us from tar sands spills

This short overview of the proposed new BC spill response framework is designed to help members of the public understand, assess and engage in developing the new framework. We will cover:

- What is changing
- Strengths, weaknesses and suggestions for improvement
- How the new framework relates to pipeline politics
- How to get involved

2. Understanding the new framework

The recent changes to the *Environmental Management Act* set out a basic structure for a new spill preparedness and response framework, but leave most of the important details on how that structure would actually work to future regulations. Although the framework is geared towards spills on land and into fresh water, it will also apply to marine incidents, where spills impact shorelines. This section summarizes the basic structure that has been proposed for BC's new framework, and how it differs from what is in place today.



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Spill Contingency Plans

The proposed framework would require each company that crosses a certain threshold, in terms of the type and quantity of substances it is responsible for transporting or storing, to prepare a Spill Contingency Plan demonstrating how it plans to respond to a spill. The thresholds for when Spill Contingency Plans would be required have not yet been determined; they are proposed to be set out by regulations. Currently, spill contingency plans are not consistently required in BC for all operations above a certain risk threshold. [1]

Area Response Plans

The proposed framework would enable the creation of Area Response Plans. As opposed to Spill Contingency Plans, which focus on the operations of a particular company, an Area Response Plan would focus on planning for spill response in a large geographic region of the Province. Area Response Plans are not currently required or regulated in BC. [2] Under the proposed framework, an Area Response Plan would be created by a Preparedness and Response Organization (see below).

Geographic Response Plans

The proposed framework would allow the Minister to order the preparation of Geographic Response Plans for specific smaller areas that are particularly subject to spill risks and/or represent sensitive environments. The BC Government intends for a Geographic Response Plan to focus on strategies to guide response in the first 48-72 hours of a spill. A Geographic Response Plan would be prepared by companies operating in the area. Geographic Response Plans are not currently required or regulated in BC.[3]

Preparedness and Response Organization

The proposed framework would allow the government to certify an organization as a "Preparedness and Response Organization" (PRO) if it demonstrates that it is capable of responding to spills in an area. A PRO would be responsible for creating an Area Response Plan. The proposed framework provides little detail about the role and structure of a PRO. The BC Government states: "Future regulations could set out more details of a PRO; though would not weigh into the specific day-to-day operations or structure of a PRO. A PRO could function as an integrator ensuring preparedness and response activities meet the requirements in law through arrangements with contractors, industry, local governments, First Nations, and other regulators." [4]

Public Reporting

The proposed framework allows for public reporting of Spill Contingency Plans, however it is not currently required. The framework would require publication of Area Response Plans and Geographic Response Plans, although details regarding such publication have not been developed. The framework would also require a Ministerial report to the Legislature on the operation of the spill response framework, although the frequency of the Minister's report has not yet been determined.

Advisory Committees

The proposed framework would require the establishment of an advisory committee to provide input into the creation of an Area Response Plan by a PRO. The role and membership of this advisory committee is not addressed by the legislation. The proposed framework also allows for the establishment of an advisory committee to assist in the development of a Geographic Response Plan, and a committee to advise the Minister on spill response issues generally. However, neither of these committees is required by the legislation, and the BC Government states that "The ministry does not plan to move forward with these requirements at this time... The ministry will seek additional input on these items at a later date."^[5]



3. Flaws and fixes: Towards a more effective and credible framework

Currently, the BC government is not proposing an accountable, effective spill preparedness and response framework that instills public confidence; but there is still time to change course. The legislation that was recently passed is little more than a shell, which means that in most cases the components of a strong framework can still be developed through the regulations.

Currently, the BC government is not proposing an accountable, effective spill preparedness and response framework that instills public confidence; but there is still time to change course.

Below we outline five key problems with the framework as proposed, as well as recommendations for how they could be addressed. Many of the recommendations are drawn from world-leading examples in other jurisdictions that were suggested by the Province's own consultants and, together, they provide a starting point that would help the proposed framework get back on track.

3.1 Industry in charge

The Problem

Preparing for and responding to spills is fundamentally about protecting BC communities, and should be governed by those with a clear public interest mandate. Unfortunately the BC Government is currently taking a hands-off approach in the framework, hoping to establish some ground rules and then let industry control the ongoing planning and management of spill preparedness and response.

The Preparedness and Response Organization (PRO) is a centrepiece of the proposed framework, and although current details on PRO governance are scarce, all indications are that a PRO would be led by companies carrying the substances that pose spill risks. In its latest consultation paper, the government explicitly says that the Ministry of Environment will not play a role in running PROs and confirms that the framework's provisions "are silent on how a PRO would be structured or operated: a PRO would be responsible for determining this."^[6]

All indications suggest that the centerpiece of the proposed framework, the Preparedness and Response Organization, would be led by the very companies carrying the substances that pose spill risks.

Although the BC Government would make a few planning decisions, such as ordering the locations for Geographic Response Plans, the bulk of the decisions are currently envisioned to be made by industry. For example, all regulated companies would be required to enter into an arrangement with a PRO, and the proposed responsibilities of a PRO are sweeping: creating area response plans; coordinating geographic response plans; coordinating spill contingency planning; conducting spill response activities; providing spill response training and education; and delivering services such as community notification, wildlife response, monitoring and waste handling.^[7]

Recommendations

- The location and content for Area Response Plans and Geographic Response Plans should be decided through a collaborative process, led by government – Provincial, local and First Nations – and with full input from stakeholders and communities at all stages (via a Citizens Advisory Committee, discussed below). The PRO should be involved as a key participant and resource, but not act as the plan leader. Government-led planning is standard in other jurisdictions such as Washington and Alaska.
- The PRO must be governed in a manner that is accountable to First Nations, local government and the public – particularly if the government disregards the above recommendation and pursues its current intention to have the PRO lead in areas such as planning, training and coordination. We propose a policy board with a majority membership of First Nations, local governments and community stakeholders, which would set overall direction for a PRO but leave daily operational matters to the industry professionals managing the PRO.



SIERRA CLUB

3.2 Weak public involvement

The Problem

Spill planning and response is an issue of great concern to communities, citizens, and their local governments. Local residents may have knowledge about the area in which they live that would be valuable to spill planning. However, there would be very few opportunities under the proposed framework for public concerns and knowledge to form part of the spill preparedness and response planning process.

The framework would require an advisory committee only for Area Response Plans. However, there is currently no guidance on who might sit on such a committee, or what the role of the committee would be. In addition, it seems likely that Area Response Plans will be so large in geographic scope as to make effective public engagement very challenging.

While the framework allows an option for an advisory committee on the more localized Geographic Response Plans, this would only occur if ordered by the government, which has said that it does not intend to implement GRP advisory committees at this time. In any event, there are currently no provisions for the roles or membership of a GRP advisory committee that would ensure it is inclusive, guarantee it a meaningful role in GRP planning, or require it to seek public input.

Lastly, although there are indications in the framework that the government intends to require some plans to be published, there are not enough details at this point to ensure that public disclosure requirements will be thorough and meaningful.

Recommendations

- The framework should require the immediate creation of a Citizens Advisory Committee whose role and funding is formal, ongoing and set out in regulations, in order to facilitate informed input from the public during all planning stages, as well as act as a citizen's watchdog to monitor implementation of the framework and industry compliance. This model has been successfully operating in Alaska for over 25 years, since it was mandated by the US *Oil Pollution Act* in the wake of the Exxon Valdez oil spill. [8] BC also once had a committee with some of those responsibilities. The British Columbia Citizens Advisory Committee on Oil Spill Prevention and Response was established in 1991 to advise the provincial government of public concerns over oil spill prevention, preparedness, and response. The Committee also monitored provincial and joint provincial/western USA initiatives in the area. [9]
- The scope of Geographic Response Plans should be expanded to include more detailed information on roles, logistics and sensitivities during an emergency, and should plan beyond the first 48-72 hours. Housing this information within company-led contingency plans is not sufficient. Local advisory committees should play an active role in creating GRPs.
- All levels of plans and reports should routinely be made public (including Spill Contingency Plans, Area and Geographic Response Plans, drill and exercise reports, incident reports, substances transported reports, etc.).



3.3 Weak accountability to First Nations

The Problem

On the few occasions where the framework addresses the role of First Nations, it contemplates First Nations offering input to the PRO or advisory bodies. The framework does not currently ensure an oversight role for First Nations in spill preparedness and response activities being carried out in their territories, nor does it require accountability of industry to a First Nation when responding to spills impacting the Nation.

Recommendations

- The proper mechanisms for accountability to First Nations will emerge through discussion with First Nations themselves, but some options include: a process to allow First Nations to certify or vet the spill preparedness and response plans of companies or a PRO operating in their territories; direct reporting to First Nations by a responsible company and/or PRO in the event of a spill; and requirements for meaningful involvement of First Nations in post-spill recovery, restoration and, where necessary, restitution.

3.4 Inadequate requirements for recovery and compensation

The Problem

The framework provides some important tools for spill recovery, such as the possibility for the government to order a responsible company to prepare a recovery plan to resolve or mitigate the impacts of a spill, after the initial clean-up effort has concluded. The framework allows the BC Government to issue a “certificate of recovery” indicating that a recovery plan, where ordered, has been carried out. However the framework as currently envisioned does not provide a process for determining “end points” for recovery efforts: in other words, the points at which spill recovery and restoration activities are determined to be effective and completed. This is an important issue with ongoing implications for affected First Nations and communities, so determination of end points requires input from those affected.

Affected communities and First Nations must be involved in determining when spill recovery and restoration is effectively completed.

In cases where restoration after a spill is not possible, although the framework makes some provision for the government to order alternative mitigation measures to be taken elsewhere or payments to be made to certain persons, the framework does not currently account for values impacted by a spill that may have non-market components such as cultural values, community values and certain fisheries values. It does not provide guidance on the types of economic losses that might be eligible for compensation, or a mechanism for making claims and recovering damages. Furthermore, the framework does not currently provide a role for impacted groups in determining whether impacts from a spill cannot be restored and, if so, what kind of alternative measures or restitution is appropriate.

Recommendations

- Clean-up and recovery end points should be determined through a collaborative process that includes all levels of government and community stakeholders.
- Where circumstances warrant, there should be provisions for the Province to appoint a Trustee group to oversee damage assessment and compensation in order to: assess residual impacts; determine who needs to be compensated and what form compensation should take; and monitor the delivery and outcomes of compensation awards. California offers a model of natural resource damage assessment and trustee oversight. Such a model helps avoid lengthy court battles that can add significantly to the financial and social damage of a spill.
- Provisions for alternative restitution and compensation should require consideration of impacts to a full range of cultural and other non-market values.
- A dedicated provincial spill fund should be established, to fund government-led spill prevention and planning, provide immediate funding for response as well as longer-term recovery activities, and top-up other liability and compensation funds if they are exceeded.



3.5 Lack of standards for effective spill response

The Problem

At the outset of this legislative initiative, BC wisely consulted with US jurisdictions that have longer experience with regulating spill response. One of the most compelling and earnestly delivered pieces of advice was that it is essential to regulate the type, quantity and location of spill response equipment required to provide effective response. Voluntary, industry-led initiatives had not worked, BC was advised; government must mandate the level of protection required and the outcomes it expects.

In the framework as proposed, neither the outcomes nor the type, quantity and locations of equipment for spill response would be mandated. No oversight of spill response, either by government, the Advisory Committees or the public, is currently required. The government might step in to order specific spill response actions if a response effort is not sufficient to “fully deal with the adverse effects of a spill on the environment, human health or infrastructure,” [10] but there are currently no standards to determine when or what type of intervention is required. Government might also step in to require a recovery plan if there were ongoing risk to the environment or human health, but no mechanism for determining the existence of that risk is currently laid out.

Recommendations

- The government needs to play a more prescriptive role in defining the type and location of equipment that must be available for spill response, ensuring that equipment that is actually capable of recovering spilled product is in fact available on a timely basis.
- The government must set standards for ‘effective’ spill response, establishing firm guidance for what is required in terms of both response and recovery to fully deal with the adverse effects of a spill on the environment or human health. Assessing whether these standards can be met should form part of the process for determining whether a given product should be allowed to be transported in BC.

The government must set standards for ‘effective’ spill response. Assessing whether these standards can be met with available equipment should form part of the process for determining whether a given product should be allowed to be transported in BC.

4 Pipeline politics: World-leading vs. effective spill response

Environment Minister Mary Polak has explicitly positioned the new framework to meet one of the BC Government's five conditions for approval of heavy oil pipelines:

"Once fully implemented, these proposed amendments will ensure a world-leading spill preparedness and response framework, satisfying one of the Province's five conditions for moving heavy oil (condition three)."[11]

Condition three requires "World-leading practices for land oil spill prevention, response and recovery systems to manage and mitigate the risks and costs of heavy oil pipelines."

There are three reasons why condition three is not addressed by the new spill response framework.

First, the framework remains largely imaginary, and the Province has acknowledged that it needs time to implement the new rules. [12] Amendments to the *Environmental Management Act* create the "framework for the Province to develop" [13] a comprehensive spill response regime, but leave all of the critical detail to regulations which have not yet been created.

Between where we are and the place we're meant to go (world-leading practices) lies about a decade's worth of regulatory development, community-based planning for spill response, sourcing of equipment, training of personnel and drilling and debriefing.

Second, even if fully implemented along the lines offered by the Ministry at its latest consultation workshop, the new framework lacks some of the essential qualities of a "world-leading" spill response framework. At the request of the Ministry of the Environment, Nuka Research and Planning Group, LLP prepared a synopsis of best practices in spill response, noting that the best systems are founded on a collaboration among government, First Nations, industry and public interest groups; and feature built-in accountability for both industry and government. [14] The proposed framework, by contrast, seeks to hand over full responsibility for planning and preparedness, as well as spill response, to industry. Government's role is largely currently limited to prioritizing the geographic areas for which planning must be done and certifying the PRO.

Finally, regardless of what terminology one uses to describe the gold standard in spill response, what matters is that it should be effective in restoring the environment, the economy and the use of public and private property to its pre-spill status. It is foolhardy to pretend that any spill response framework could result in such restoration after a spill of tar sands oil. As the Province of BC itself observed in its written submissions to the Joint Review Panel reviewing Enbridge's Northern Gateway proposal (NG), it has serious concerns about what diluted bitumen will do when it enters the water, and it is not convinced that the response technologies mentioned by Enbridge in its application can deal with sunken oil. [15]



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Effective spill response is what matters; spill response should be effective in restoring the environment, the economy and the use of public and private property to its pre-spill status. It is foolhardy to pretend that any spill response framework could result in such restoration after a spill of tar sands oil.

Since the Enbridge hearings, publications from both Environment Canada [16] and the US National Academy of Sciences [17] have made it clear that, in fresh water environments, diluted bitumen is expected to sink quite rapidly, evading attempts to track, confine and remove it from the water. There is no technology currently available that could find and remove sunken oil from, for example, the Fraser River, before it destroyed salmon spawning grounds and other important fish habitat.

The proposed framework cannot, therefore, justify Provincial approval of Enbridge's Northern Gateway, Kinder Morgan's Trans Mountain, or any other heavy oil pipeline proposal.

5 Protecting the public interest

Strengthening spill planning and response in BC is critically important, and with such sweeping changes on the table, the new framework has potential. However as currently envisioned, the proposed changes to spill planning and response do not put BC on course to build an accountable, effective framework that instills public trust. Key deficiencies must be corrected to get back on track, most notably around who controls the planning process and how decisions are made before, during and after a spill.

There is no shortage of research, examples or experience to draw upon to create a truly world-leading spill response framework, many of which can be found in our neighbouring jurisdictions of Washington and Alaska. What is needed is the political will to design a framework that operates in the public interest, rather than at the convenience of industry.

If British Columbians speak up, we can build an accountable, effective framework that serves the public rather than polluters, and puts us in in the best possible position to protect our air, land, water and communities from toxic spills.

It's time for British Columbians to get involved. Industry has had the access and the resources to influence the proposed framework from the outset, but now government needs to hear from the BC public. We won't get another opportunity to shape spill planning and response on this scale for a generation. There is still time to change course. If we all speak up, we can build a framework that serves the public rather than polluters, and puts us in in the best possible position to protect our air, land, water and communities from toxic spills. We can also ensure that government understands that better spill response for the threat of existing hazardous materials transport will never buy social licence to build new pipelines.

GET INVOLVED

Make your voice heard! Public comments will be accepted until June 30, 2016.

Join discussion forums and submit comments on the BC Government website:

<http://engage.gov.bc.ca/spillresponse>

Use one of our online tools to make an easy submission with maximum impact:

www.georgiastrait.org/BCSpillResponse

www.wcel.org/BCSpillResponse

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End Notes

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CAUTION



**SPILL CLEANUP
IN PROGRESS
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Georgia Strait Alliance is a registered charity that works to to protect and restore the marine environment and promote the sustainability of Georgia Strait, its adjoining waters, and communities.



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.



Living Oceans Society has been a leader in the effort to protect Canada's oceans since we formed in 1998. We advocate for oceans that are managed for the common good, according to science-based policies that consider ecosystems in their entirety.