



WILL THE PACIFIC NORTH COAST OIL TANKER BAN HOLD WATER?

A review of Canada's proposed new legislation



In January 2016, West Coast Environmental Law Association released [Keeping Our Coast Clean: Frequently asked questions about an oil tanker ban on BC's Pacific North Coast](#), in response to the Prime Minister's direction to formalize an oil tanker ban on the north coast of BC. Since that time, West Coast lawyers have participated in Transport Canada roundtables, made written and oral submissions, and met with Ministers and federal officials to advocate for strong oil tanker ban legislation, [in collaboration](#) with allies from First Nations, labour organizations, northern community groups and environmental organizations.

On November 29, 2016, the federal government announced that it will introduce legislation in spring 2017 to entrench an oil tanker ban on the north coast of British Columbia, and it provided preliminary details on the content of the legislation. Below we review the available details about the federal government's proposal for oil tanker ban legislation and evaluate its strengths and weaknesses.



WHAT LEGAL MECHANISM IS CANADA PROPOSING TO USE TO FORMALIZE THE OIL TANKER BAN?

What West Coast has advocated for:

West Coast has argued that the oil tanker ban should be formalized by an Act of Parliament because this is both the strongest and most transparent legal method of entrenching the ban.

What Canada has committed to do:

Canada has adopted the approach advocated by West Coast, committing to introduce oil tanker ban legislation by spring 2017.

WHAT VESSELS WOULD BE COVERED BY THE OIL TANKER BAN?

What West Coast has advocated for:

In meetings with federal Ministers, West Coast submitted that the oil tanker ban should prohibit the transport of more than 2,000 tonnes of oil as cargo in an oil tanker. The 2,000-tonne threshold was initially identified as an option by Transport Canada in its [oil tanker ban discussion paper](#). West Coast supported the 2,000-tonne threshold because in our view it accomplishes the dual objectives of protecting northern ecosystems and communities from the spill risks posed by bulk shipments of oil, including petroleum tank barge shipments, while at the same time allowing smaller fuel resupply shipments to continue to service coastal communities.

What Canada has committed to do:

Canada announced that it intends the oil tanker ban legislation to apply to any vessel carrying more than 12,500 tonnes of crude oil or persistent oil products. According to federal officials, this threshold was chosen because it is somewhat higher than the current largest shipments of such products recorded in BC's north coast region. In other words, the 12,500-tonne threshold would allow all existing shipments of oil products in the region to continue; this would include existing petroleum tank barge shipments between Alaska and Washington State. The issue of petroleum tank barges is discussed further below.

WHAT OIL PRODUCTS WOULD BE COVERED BY THE OIL TANKER BAN?

What West Coast has advocated for:

West Coast has argued that the scope of oil products covered by the oil tanker ban should be defined broadly to include all types of refined and crude oil cargo, from gasoline to bitumen, in order to ensure that the ban fulfills its purpose of protecting ecologically sensitive areas and local economies from the potentially catastrophic impacts of a large oil tanker spill.

What Canada has committed to do:

Canada announced that it intends to apply the oil tanker ban to all crude oil, and to a limited range of refined oil products classed as “persistent oil,” while excluding other “non-persistent” refined oil products from the scope of the oil tanker ban.

As West Coast understands it from our conversations with federal officials, Canada intends to adopt a two-pronged approach to the types of oil covered by the oil tanker ban. First, the oil tanker ban will apply to the shipment of “crude oil” as defined in the [International Convention for the Prevention of Pollution from Ships](#) (“MARPOL”), which reads:

“Crude oil” means any liquid hydrocarbon mixture occurring naturally in the earth whether or not treated to render it suitable for transportation and includes:

- a) crude oil from which certain distillate fractions may have been removed; and
- b) crude oil to which certain distillate fractions may have been added.

Second, the oil tanker ban legislation will also contain a Schedule of persistent oil products that, while not technically crude oil, pose similar risks when spilled. [According to Transport Canada](#), “persistent oil” and “non-persistent oil” are two classes of oil that generally distinguish between heavier oil products that dissipate very slowly when spilled, and somewhat lighter oil products that do not dissipate as slowly. All persistent oil products contained in the Schedule would be covered by the oil tanker ban, however the Schedule would be subject to amendment over time to add or remove products. Canada has not yet disclosed a full preliminary list of persistent oil products to be covered in the Schedule, however it has provided some [examples](#). For instance, Canada suggests that products such as Bunker C fuel oil would be included in the Schedule as a persistent oil, whereas products such as gasoline and propane would be excluded.

It is worth noting that, according to federal officials, “crude oil” would be permanently covered by the oil tanker ban legislation by virtue of its shipment being prohibited in the Act itself, whereas the other “persistent oil” products covered by the ban in the Schedule could be added or removed in future through the regulatory process. In other words, crude oil would be permanently covered by the ban, persistent oil would be covered by the ban but potentially open to future regulatory change, and non-persistent oil would not be covered by the ban.



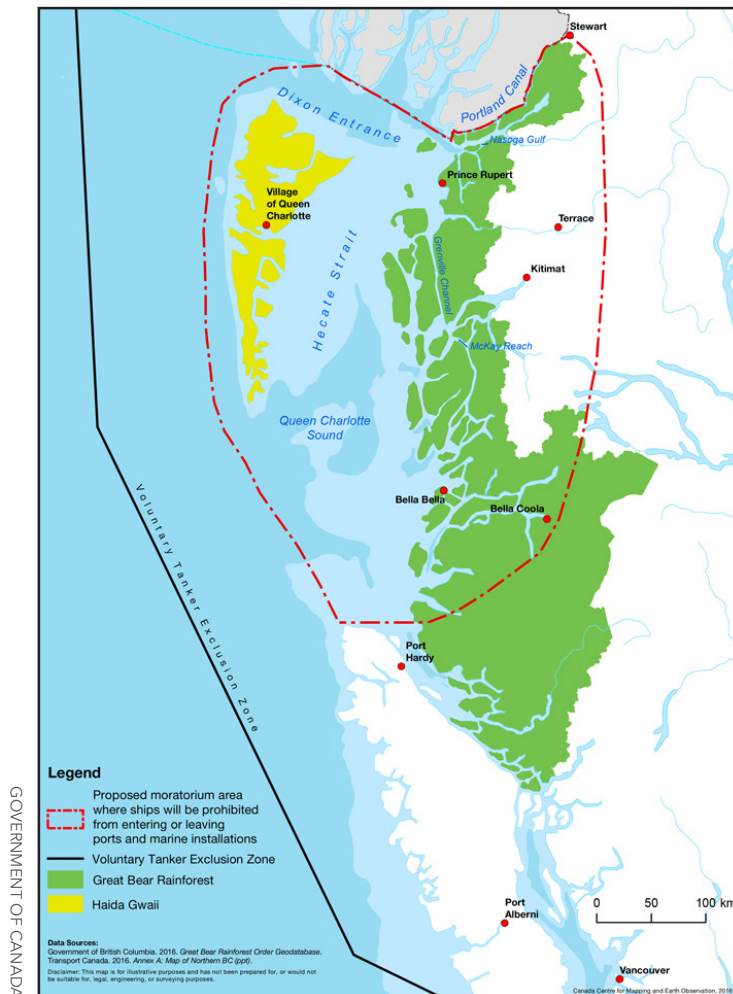
WHERE WOULD THE OIL TANKER BAN APPLY?

What West Coast has advocated for:

West Coast has argued that the oil tanker ban should prohibit relevant vessels from the entire geographic area of Hecate Strait, Dixon Entrance and Queen Charlotte Sound.

What Canada has committed to do:

Canada announced that it intends for the oil tanker ban to prohibit relevant vessels from entering or exiting all ports and marine installations in the region of Hecate Strait, Dixon Entrance and Queen Charlotte Sound. In other words, under Canada's proposed approach, the oil tanker ban would not prohibit vessels from passing through the north coast region, rather it would prohibit the vessels from entering or exiting any port. (It is worth noting that the Voluntary Tanker Exclusion Zone will remain in place, which has existed for many decades to prevent oil tankers transiting between Alaska and Washington State from getting too close to Canada's coast).



The rationale for this narrower geographic scope appears to relate to international relations with the United States. As West Coast has previously noted, Canada takes the view that Hecate Strait, Dixon Entrance and Queen Charlotte Sound are historic internal waters subject to Canadian jurisdiction, although the United States maintains that a right of innocent passage for vessels exists through those waters. Our discussions with federal officials suggest that the federal government shares our legal view that Canada

would have jurisdiction in international law to impose the oil tanker ban over the entire region, however it does not wish to do so because Canada believes such an approach may provoke diplomatic tension with the United States. Instead, Canada prefers banning entry and exit from ports and marine installations as a narrower alternative that would avoid potential disagreements with the United States.

HOW LONG WOULD THE OIL TANKER BAN LAST?

What West Coast has advocated for:

West Coast has argued that oil tanker ban legislation should be of indefinite duration, and in particular, that it should not contain any form of “sunset clause” that would allow the oil tanker ban to expire or be reopened for debate.

What Canada has committed to do:

In West Coast’s conversation with federal officials, Canada has confirmed that the legislation is intended to be indefinite and will not contain a sunset clause. In other words, Canada has indicated that the only means of getting rid of the oil tanker ban, once it is passed into law, would be to repeal the legislation in Parliament. The one caveat is that the Schedule of “persistent oil” products covered by the oil tanker ban could be amended in future through the regulatory process to add or remove products. In contrast, federal officials have stated that all “crude oil” will be permanently covered by the ban.

WEST COAST ENVIRONMENTAL LAW’S PERSPECTIVE: Points to applaud in the proposed federal approach to the oil tanker ban

In many regards, Canada’s announced plan for a legislated oil tanker ban is praiseworthy. In particular, West Coast applauds Canada’s approach of legislating the oil tanker ban through an Act of Parliament, and its commitment to make the ban permanent by not including any expiry or reconsideration provisions in the Act. West Coast also applauds Canada’s approach of prohibiting the shipment of crude oil in the Act itself rather than in a Schedule, because this closes off the possibility of any crude oils being subsequently removed from the scope of the oil tanker ban (absent amendment of the Act by Parliament). Further, while West Coast would prefer to see all oil products covered under the ban, Canada does propose to go beyond simply prohibiting crude oil shipments by proposing to also prohibit shipments of persistent oil products that will be included in the Act’s Schedule. Finally, an oil tanker ban in the form Canada proposes would rule out future megaprojects similar to the now-rejected Enbridge Northern Gateway pipelines and tankers proposal, which would have exported diluted bitumen in Very Large Crude Carriers through Douglas Channel. This is certainly a positive development.

WEST COAST ENVIRONMENTAL LAW'S PERSPECTIVE: Concerns regarding the proposed federal approach to the oil tanker ban

Canada's approach to the oil tanker ban does cause a number of concerns from West Coast's perspective. We have already summarized above the ways in which Canada's approach to oil tanker ban legislation diverges from West Coast's recommendations. To illustrate in a more practical way the concerns this raises, we will highlight three examples of concerning oil shipments that would be allowed under Canada's proposed approach to the oil tanker ban.

1 **Canada's proposed oil tanker ban allows existing petroleum tank barge traffic to continue**

While locals had been raising concerns for years, the issue of existing petroleum tank barges plying BC's north coast rose to national prominence in autumn 2016 with the [grounding of the tug Nathan E. Stewart](#), which was transporting the (fortunately) empty fuel barge DBL 55. The sinking of the tug spilled over 100,000 litres of diesel and over 2,000 litres of industrial lubricants into the ocean, causing shellfish closures in the area. The tug sat on the sea floor for over a month before it was finally [removed by a giant crane](#) in November 2016. The incident has been called an "environmental disaster" by Chief Marilyn Slett of the Heiltsuk Nation, and the impacts could have been exponentially worse had the oil tank barge transported by the Nathan E. Stewart been fully loaded with a typical cargo of refined petroleum products.

In West Coast's view, the oil tanker ban should apply to such petroleum tank barges, which are substantially larger than the vessels shipping fuel to coastal communities in the region. The oil tank barges currently pass through BC's north coast area without stopping, in transit between Washington State and Alaska. [Observers have stated](#) that they would prefer to see those shipments consolidated into tankers travelling outside the [Voluntary Tanker Exclusion Zone](#), well off BC's coast.

For these reasons, West Coast submitted in meetings with Ministers that the oil tanker ban should prohibit the transport of more than 2,000 tonnes of oil as cargo in an oil tanker, with oil being defined to include any crude or refined oil products. Based on the information we have available, a 2,000-tonne threshold would allow community fuel shipments to continue, while prohibiting the larger tank barge shipments that currently pass through the region in transit between Alaska and Washington State. Given the risks posed by such petroleum tank barge shipments, as underlined by the sinking of the Nathan E. Stewart, in our view a 2,000-tonne threshold would ensure that the moratorium fulfills its purpose of protecting ecologically sensitive areas and local economies from the potentially catastrophic impacts of a spill.

Canada's proposed approach to the oil tanker ban would not prohibit existing petroleum tank barge shipments, for three reasons. First, Canada has proposed that the oil tanker ban only prohibit shipments larger than 12,500 tonnes, in order to ensure that no current shipments of oil products are affected. The existing petroleum tank barge shipments fall under the 12,500-tonne threshold and thus would not be captured by the ban. Second, Canada has proposed that the ban apply only to entry and exit from ports and marine installations in the region, not to vessels that pass through the region without stopping. The existing petroleum tank barges that pass through BC's north coast region in transit between Alaska and Washington State do not stop at ports on BC's north coast, thus they would not be impacted by such a ban. Third, the oil tanker ban would not apply to refined oil products classed as "non-persistent", which would include at least some of the fuel products currently transported by the petroleum tank barges. Consequently, Canada's proposed approach to the oil tanker ban would clearly allow petroleum tank barge shipments to continue on BC's north coast.



2 Canada's proposed oil tanker ban does not prevent supertankers from shipping lighter refined oil products in the region

There are currently two proposals for oil refineries and related supertankers carrying refined oil on BC's north coast that have entered the federal environmental assessment process: the [Kitimat Clean Refinery Project](#) and the [Pacific Future Energy Refinery Project](#). The economic viability of such refinery proposals have been [met with skepticism](#). However, the protection of BC's north coast from oil tankers should not be left to market conditions; such protection should be ensured by oil tanker ban legislation that comprehensively guards against oil spill risks from tankers. The oil tanker ban's rationale of protecting the region's ecosystems, communities and economy from the risk of oil spills applies equally to tankers carrying refined and crude oil. Thus, in West Coast's view, there is a need for a clear and strong prohibition that applies to bulk shipments of all types of oil products.

Canada [explicitly notes](#) that its approach to the oil tanker ban will not include refined oil products such as gasoline, jet fuel and propane. These are the types of products that the existing refinery proposals intend to produce and export through BC's north coast waters via supertanker. For example, [Kitimat Clean Ltd. proposes](#) to refine bitumen into products including gasoline, jet fuel and propane and export those products on Very Large Crude Carrier tankers through Douglas Channel. Since Canada's proposed approach would not apply the oil tanker ban to these types of refined oil products, it would not prevent Very Large Crude Carrier tankers filled with gasoline, jet fuel or other such products from entering and exiting marine terminals on BC's north coast.



3 Canada's proposed oil tanker ban does not rule out marine exports or imports of smaller cargos of crude oil

As a matter of law, the crude oil tanker ban proposed by the federal government would not actually ban crude oil tankers. Rather, Canada's approach would prohibit vessels, including oil tankers, from entering or exiting ports and marine installations with a cargo of more than 12,500 tonnes of crude and persistent oil. In other words, under Canada's proposed approach it would be legally permissible for tankers to export or import smaller cargos of crude oil in the oil tanker ban region, provided that each vessel stayed below the 12,500-tonne threshold. This raises the question of whether the threshold is strict enough to actually deter proponents from introducing projects that would significantly increase marine shipments of crude oil in the region.

Transport Canada's apparent assumption is that it would not be economically viable to undertake large-scale projects to export or import crude and persistent oil in vessels limited to carrying a maximum of 12,500 tonnes of those products. It is true that the [deadweight tonnage of standard tankers](#) is significantly higher than Canada's proposed 12,500-tonne limit (deadweight tonnage includes weight from cargo as well as fuel, supplies, etc., so a vessel's cargo tonnage would be lower than its deadweight tonnage). On the other hand, Canada's proposed threshold is more than six times higher than the 2,000-tonne threshold initially raised by Transport Canada in its discussion paper. Ultimately, there is not currently enough public information to be confident that a 12,500-tonne threshold is sufficiently restrictive to prevent future large project proposals that would significantly increase marine crude or persistent oil shipments in the region.



SUMMARY

We believe there are a number of points to applaud in the federal government's oil tanker ban proposal, in particular: it would be legislated by an Act of Parliament; it would not have an expiry date; and it would prevent future massive crude oil supertanker proposals similar to the now-defunct Enbridge Northern Gateway.

However it is clear that, as currently proposed, the oil tanker ban would not prevent existing bulk petroleum product shipments in tank barges pushed by tugs such as the recently-sunken Nathan E. Stewart. Nor would it prohibit supertankers carrying refined oil products such as those proposed to be produced by the two oil refinery projects near Kitimat that have begun a federal environmental assessment. Further, there is not currently enough information to confirm with certainty that Canada's proposed threshold of 12,500 tonnes for when the oil tanker ban "kicks in" is sufficiently restrictive to deter new projects proposing to introduce smaller-scale bulk crude or persistent oil imports and exports in the region.

In order to address these concerns, the threshold for when the oil tanker ban "kicks in" would need to be lowered (preferably to 2,000 tonnes), the scope of oil covered would need to expand to include refined oil products such as those proposed to be produced by the Kitimat-area oil refinery proposals, and the oil tanker ban would need to apply to the full geographic area of Hecate Strait, Queen Charlotte Sound and Dixon Entrance rather than simply to entry and exit from ports and marine installations in that region.

Lastly, regardless of whether Canada maintains or changes its current position on these points, the public needs more information to properly evaluate and engage with the bill that will soon be tabled to entrench the oil tanker ban. To this end, we recommend that Transport Canada publically release the information it has gathered regarding past and existing marine oil transport in BC's north coast region, as well as provide a detailed rationale for its proposed 12,500 tonne threshold.



WHAT HAPPENS NEXT?

The federal government is currently preparing a bill to entrench the oil tanker ban, which it will introduce in spring 2017 (potentially in March, according to our discussions with federal officials). At that point, the public will have an opportunity to review and engage with the details of the oil tanker ban bill through the Parliamentary process. Anyone interested in making their views known to Transport Canada in the meantime, while Canada is preparing the oil tanker ban bill, can contact the Parliament Hill office of Transport Minister Marc Garneau at Marc.Garneau.A1@parl.gc.ca. You can also write to the Minister at:

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Ottawa, Ontario, K1A 0A6

Mail may be sent postage-free to any Member of Parliament.

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