

Pickernel, Pipelines and Pancakes: Proposed Federal Environmental Legislation (and some comments on provincial jurisdiction over interprovincial pipelines)



**UNIVERSITY OF
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Environmental Law Centre's Green Regs and Ham

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24 April 2018

1. Pickerel (or any other fish – whether fished or not!):
 - Bill C-68: Amendments to the *Fisheries Act*
2. Pipelines:
 - Bill C-69: Proposed *Impact Assessment Act* and *Canadian Energy Regulator Act*
 - Broad overview
 - Comparing current vs. future regime for reviews of interprovincial pipeline projects
3. Provincial jurisdiction w/r/t pipelines:
 - The current caselaw
 - Implications for BC's regulations and court reference;

- 2015: Federal election campaign promises (Liberal);
- 2016: Mandate letters to Minister of Fisheries and Oceans, Transport, Environment and Climate Change:
 - Review 2012 changes with a view to “restore lost protections and incorporate modern safeguards.”
- 2017: Main Reviews, Reports and Discussion Papers:
 - Standing Committee on Fisheries and Oceans (FOPO) re: *Fisheries Act* changes (February)
 - Standing Committee on Communities, Transportation, and Infrastructure re: *Navigation Protection Act* (March)
 - Expert Panel on Environmental Assessment: Building Common Ground (April)
 - Expert Panel on National Energy Board Modernization (May)
 - Government of Canada’s Discussion Paper (June)
- 2018: Bills C-68 (*Fisheries Act*) and C-69 (*IAA, CERA, CNWA*)

Bill C-68: Amendments to the *Fisheries Act*



<https://www.transmountain.com/news/2017/innovative-use-of-snow-fencing-protecting-spawning-salmon-and-trout>

FOPO *Fisheries Act* Report

- The Committee recommended:
 - **A return to the prohibition against harmful alteration, disruption or destruction (HADD)** of fish habitat (excision of 2012 “serious harm to fish” regime);
 - **Greater clarity around what constitutes a HADD**, with a view towards certain sectors in particular (municipalities, agriculture);
 - **Increased resources** for project review and enforcement;
 - An **online registry/database** for authorizations and better reporting of the state of fish habitat;
- Government’s 2017 Discussion Paper (June) basically endorsed all of these recommendations
 - Also signaled intentions to formally recognize **Indigenous jurisdiction** in fisheries management

Fisheries Act

2012, c. 19, s. 133(3), c. 31, s. 175

1 (1) The definitions *commercial*, *Indigenous* and *recreational* in subsection 2(1) of the *Fisheries Act* are repealed.

Bill C-38
The Fisheries Act says you
can't do this to fish habitat...

What is a HABITAT? Harm
Harmful alteration:

- Change it so that it can't support as many fish as it used to

Disruption:

- You can't change it for the better, even just a little while

Destruction:

- Permanently ...somehow

...unless you are specifically
Authorized to do so...and then
You have to replace it, with
something just like it or better and
usually nearby.



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■ New definitions:

- Fish habitat: “**water frequented by fish** and any other areas on which fish depend directly or indirectly to carry out their life processes...”
- “fishery”: “...with respect to any fish, includes, (a) any of its species, populations, assemblages and stocks, **whether the fish is fished or not**”
- “Indigenous governing body”: “means a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people...”

■ **New Purpose Clause:**

To provide a framework for

- (a) the proper management and control of fisheries; and
- (b) the conservation and protection of fish and fish habitat, including by preventing pollution.

- This is essentially a **codification of existing jurisprudence** (see *Ward v. Canada* 2002 SCC 17 at para 41; *Comeau's Sea Foods Ltd. v. Canada* [1997] 1 SCR 12 at pp 25-26)

■ **Indigenous Peoples of Canada**

- Sections 2.4 and 2.5 explicitly recognize relationship between Fisheries Act decisions and section 35 rights;
- Section 4 amended to allow MFO to enter into agreements and partnerships w/ Indigenous governing bodies.

- Habitat Protection Provisions:
 - Return of the HADD (sections 34 and 35)
 - Prohibition against works, undertakings and activities that are likely to result in harmful alteration, disruption, or destruction of fish habitat.
- Legislation appears to contemplate **3 types** of works, undertakings, and activities:
 - Minor ones – subject to **guidelines and codes** of practice to **avoid** impacts;
 - e.g. CEPA Pipeline Associated Watercourse crossings
 - Medium ones – *ad hoc* review, may require authorization or “Letter of Advice”;
 - Designated projects – listed in regulation, *a/ways* requiring authorization

Bill C-68 (*Fisheries Act*) cont'd

- Expanded list of **mandatory considerations** before issuing an authorization:
 - (a) the contribution to the productivity of relevant fisheries by the fish or fish habitat that is likely to be affected;
 - (b) fisheries management objectives;
 - (c) whether there are measures and standards
 - (i) to avoid the death of fish or to mitigate the extent of their death or offset their death, or
 - (ii) to avoid, mitigate or offset the harmful alteration, disruption or destruction of fish habitat;
 - (d) *the cumulative effects of the carrying on of the work, undertaking or activity referred to in a recommendation or an exercise of power, in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat;*
 - (e) *any fish habitat banks, as defined in section 42.01, that may be affected;*
 - (f) whether any measures and standards to offset the harmful alteration, disruption or destruction of fish habitat give priority to the restoration of degraded fish habitat;
 - (g) *traditional knowledge of the Indigenous peoples of Canada that has been provided to the Minister; and*
 - (h) any other factor that the Minister considers relevant.

Other “modernization” elements:


■ Habitat Banking

- “an area of a fish habitat that has been created, restored or enhanced by the carrying on of one or more conservation projects within a service area and in respect of which area the Minister has certified any habitat credit under paragraph 42.02(1)(b)”.
- Questions as to whether legislation permits 3rd party banking;



Public Registry

42.2 The Minister shall establish a public registry for the purpose of facilitating access to records relating to matters under any of sections 34 to 42.1.



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In accordance with the *Responsible Energy Development Act of Practice*, the AER publishes its decisions on applications by

Accessing Decisions

Many AER approvals and decisions can be accessed via the [Public Registry](#) which allows a user to search for a decision based on geographical and date. For details on the application, supporting document [Query tool](#).

Decisions may also be accessed through the following documents:

- [ST1 - Well Licences Issued](#)
- [ST96 - Pipeline Approval and Disposition Daily List](#)
- [ST97 - Facility Approvals Daily List](#)

Our Approach SARA Components Get Involved Advanced Search A to Z Species Index

Home > Permits, Agreements and Exceptions > Permits and Agreements

Species at Risk Act (SARA) Permits and Agreements

Information Note

The Minister of the Environment has issued the [Permits Authorizing an Activity Affecting Listed Wildlife Species Regulations](#). The regulations have been published in the [Canada Gazette](#), Part II. For additional information, please also consult the [Questions and Answers](#).

As part of the Responsible Resource Development plan announced on April 17, 2012, some changes have been made to the [Species at Risk Act \(SARA\)](#) which will reduce regulatory burden while strengthening environmental protection. [See Factsheet](#)

Under Section 73 of SARA, the competent minister may enter into an agreement or issue a permit authorizing a person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or its residences. If entered into or issued, the competent minister must include an explanation of why this was entered into or issued in the Public Registry.

Agreements or permits may be entered into or issued for the following purposes:

- The activity is scientific research relating to the conservation of the species and conducted by qualified persons;
- The activity benefits the species or is required to enhance its chance of survival in the wild; or
- Affecting the species is incidental to the carrying out of the activity.

Visit the [general frequently asked questions](#) relating to SARA permitting.

Permit Applications

Permits are required by those persons conducting activities that may affect species listed on [Schedule 1](#) of SARA, as extirpated, endangered, or threatened and which contravene the Act's [general](#) or [critical habitat](#) prohibitions. Depending on the species and its location, applications should be directed to the appropriate authorities.

To apply for a permit for an activity affecting a Schedule 1 species in any national park, national historic site or national marine conservation area administered by Parks Canada (protected heritage areas), please visit the following:

- For research and collection activities, you should submit your application through [Parks Canada's online research and collection permit system](#)
- For other activities, you should contact the specific protected heritage area directly; their contact details are available on the [Parks Canada website](#)

To apply for a permit affecting a Schedule 1 aquatic species, please visit the [Department of Fisheries and Oceans website](#)

For all other SARA permit applications, please use the following instructions and application form and submit to the appropriate [Environment and Climate Change Canada regional office](#) for processing.

- [SARA Permitting System](#)
- Print or download the [SARA permit application form](#):
 - [PDF Format, 100 KB](#) - [Get Adobe Reader](#)
 - [Text Format](#)
- [Guidelines for Permitting Under Section 73 of the Species at Risk Act](#)
- [Service Standards and Performance Targets for Permitting Decisions Under the Species at Risk Act](#)
- Complete all fields. Insert N/A if a field is non-applicable.
- Complete any supporting documentation.
- Fax, mail, or email your completed application and any supporting documents to the appropriate regional office for processing.

Permits and Related Agreements

Year 2018

- [January](#)
- [February](#)
- [March](#)
- [April](#)
- [July](#)
- [August](#)
- [January](#)
 - [Explanation for issuing permit \(#10179-10198, 20108-20127, and 31493-31592\), pursuant to the provisions of section 74 of SARA - American Marten](#)
 - [Explanation for issuing permit \(#PNP-2018-01\), pursuant to the provisions of section 74 of SARA - Caribou](#)

Bill C-69: *Impact Assessment Act (IAA)*

BETTER RULES TO PROTECT CANADA'S ENVIRONMENT AND GROW THE ECONOMY

BENEFITS FOR CANADIANS

ASSESSING WHAT MATTERS TO CANADIANS

Developing resources while protecting the environment requires taking a big-picture look at a project's potential impacts.

Project reviews would consider not just impacts on our **environment**, but also on **social and health aspects, Indigenous peoples, jobs and the economy** over the long-term. We will also conduct gender-based analyses.

Project reviews would consider how projects are consistent with our environmental obligations and climate change commitments, including the Paris Agreement on Climate Change.

We would undertake a **strategic assessment for climate change** to provide guidance on how to consider greenhouse gas emissions in individual project reviews.

REGULATORY CERTAINTY AND PREDICTABILITY FOR COMPANIES

The new impact assessment system would be **more efficient and predictable**, giving companies the **clarity** they need.

Project reviews would be rigorously managed to ensure that they are more timely. Companies will know what is required from them at the outset, including what is required for Indigenous engagement.

A revised project list based on clear criteria would identify which types of projects would require a review, offering greater clarity about how the new rules apply.

PUBLIC PARTICIPATION, SCIENCE, AND TRANSPARENCY

We would ensure that Canadians' views are heard from the start and through public funding programs for Indigenous peoples and the public.

Project decisions would be guided by **science, evidence and Indigenous traditional knowledge**. Science and evidence provided by companies would be rigorously reviewed by federal scientists. Independent reviews would be done where there is strong public concern or the results of a study are uncertain.

We would increase online access to science and evidence, including data on follow-up, monitoring, compliance and enforcement. We would also make easy-to-understand summaries of decisions publicly available.

A SINGLE AGENCY TO CONDUCT IMPACT ASSESSMENTS

To rebuild public trust and make the review process **more efficient and consistent**, a single agency would lead federal project reviews and coordinate consultations with Indigenous peoples.

The Canadian Environmental Assessment Agency would become the Impact Assessment Agency of Canada. It would work collaboratively with life-cycle regulators, such as the Canadian Energy Regulator, the Canadian Nuclear Safety Commission and offshore boards.

The Agency would coordinate with provinces and territories to advance our commitment to **one project, one review**.

PARTNERING WITH INDIGENOUS PEOPLES

The goals of **reconciliation** must guide our shared path forward.

There would be **early and regular engagement** with Indigenous peoples based on recognition of Indigenous **rights and interests** from the start.

We would work in partnership with Indigenous peoples for project reviews.

Consideration of Indigenous traditional knowledge would now be mandatory. We would protect the confidentiality of Indigenous traditional knowledge (e.g. sacred site locations) and respect Indigenous laws and protocols for its use.

A NEW CANADIAN ENERGY REGULATOR

A modern energy regulator has an essential role to play in ensuring access to safe, **affordable and reliable energy** and guiding Canada's transition to a **low-carbon economy**.

We would replace the National Energy Board with an independent, new federal agency called the Canadian Energy Regulator (CER).

This would ensure that good projects go ahead with **timely decisions** that reflect common values and shared benefits.

The new CER would be built on: **modern effective governance, more inclusive engagement, greater Indigenous participation, stronger safety and environmental protection, and more timely decisions.**

Life-cycle regulators will retain responsibility for the assessment of non-designated projects.

PROTECTING CANADA'S NAVIGABLE WATERS

To protect the public right of navigation, we are bringing forward the *Canadian Navigable Waters Act*.

New navigation protections would apply to all of Canada's navigable waters — covering our vast network of rivers, lakes and canals. New **modern safeguards** would create **greater transparency**, and give local communities a say in projects that could affect their navigation.

This includes a greater level of oversight for navigable waterways that are most important to Canadians and to Indigenous peoples, including eligible Heritage and wild and free-flowing rivers.

RESTORING LOST PROTECTIONS TO FISH AND FISH HABITAT

We are strengthening the protection of all fish and fish habitat for future generations. Legislative amendments would **restore lost protections** by protecting all fish and fish habitats; **strengthen the role of Indigenous peoples** in project reviews, monitoring and policy development; and allow for **better management of large and small projects** that may be harmful to fish or fish habitat through a new permitting system and codes of practice.



- Same basic architecture as *CEAA*, 2012:
 - Primary trigger: designated project list (regulations)
 - Secondary regime for projects on federal lands

- Main differences:
 - A single agency responsible for all standard IAs
 - NEB/CER & CNSC → Joint Review Panels (~ pre-2012 regime)
 - Planning phase = bulked-up “screening” decisions
 - Expanded scope (in both assessment and decision-making)
 - All impacts (environmental *plus* economic, social, health)
 - Additional factors: contribution to sustainability, to environmental commitments, to climate change
 - More transparency: detailed reasons required

IAA as seen through a pipeline (project)...

- Under *CEAA, 2012*, NEB is a “responsible authority”
- Sections 28 – set out the relevant scheme;
 - Section 28: “interested party” provisions – **standing test**
 - Section 29(1): content of the report:
 - (a) recommendations with respect to paragraph 31(1)(a);
 - (b) recommendation with respect to the follow-up program that is to be implemented with respect to the designated project.
 - Section 29(2): timing and response by minister
 - Section 29(3): Final report is “final and **conclusive**” (**privative clause**)
 - Section 30: process for reconsideration of recommendations
 - Section 31: recommendations w/r/t to adverse environmental effects

“Interested party” standing test

- “interested party” determined by RA:
 - “...a person is an interested party if, in [RA’s] opinion, the person is **directly affected** by the carrying out of the designated project or if, in its opinion, the person has **relevant information or expertise**”
 - NEB’s approach to standing upheld in *Forest Ethics Advocacy Assn. v. National Energy Board* 2014 FCA 245;
- IAA does not carry over any standing test
 - BUT: it is not clear how much public participation will be provided;
 - NB: Fluker and Srivastava examined application of standing test in 4 projects (New Prosperity Mine, Shell Jackpine Mine Expansion, Site C, and TMX) and found “**inconsistent rulings on public participation under CEAA 2012.**” See (2016) 29 J. Env. L. & Prac. 65

Reconsideration provisions & privative clause

Gitxaala Nation v. Canada 2016 FCA 187 (CanLII):

- [122] In particular, the [EA] under the [CEAA, 2012] plays no role other than assisting in the development of recommendations submitted to the [GiC] so it can consider the content of any decision statement and whether, overall, it should direct that a certificate approving the project be issued.
- [123] **This is a different role—a much attenuated role—from the role played by [EA] under other federal decision-making regimes...**
- [124] Under this legislative scheme, **the [GiC] alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a “report”** within the meaning of the legislation... [with references to the privative clause]
- [125] In the matter before us, several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative scheme, those applications for judicial review did not lie. No decisions about legal or practical interests had been made...

- That Panel Reports may be reviewed directly well established, see e.g. *Alberta Wilderness Assn. v. Canada (MFO)*, [1999] 1 FCR 483;
 - The view that the panel report is an essential statutory prerequisite to the issuance of approvals is supported by previous case law. I agree with the decisions of *Bowen v. Canada (Attorney General)*, 1997 [...] *Friends of the West Country, supra*; and *Union of Nova Scotia Indians v. Canada* [...] which hold that an [EA] carried out in accordance with the Act is required before a decision such as the Minister's authorization in the present case can be issued...
- Not clear on what basis FCA concluded EA by NEB not directly reviewable; recommendatory role of NEB = recommendatory role Panels

Provincial Jurisdiction over Interprovincial Pipelines



Recall: Validity, Paramountcy and IJI

- **Validity:**
 - Legislation and subordinate regulation must first be deemed valid:
 - Determine “pith and substance”: “what in fact does the law do and why?”
- **Paramountcy – 2 branches:**
 - Operational conflict:
 - Actual conflict in operation: one enactment says “yes” and the other says “no”
 - More strict provincial law does not necessarily result in conflict
 - Frustration of purpose:
 - Whether operation of the provincial Act is compatible with the federal legislative purpose
- **Interjurisdictional Immunity (IJI)**
 - Impairment of “core” of federal power (e.g. pipeline routing)

Timeline of Relevant Events and Decisions

- 2012: BC imposes 5 conditions on construction of heavy oil pipelines:
 - “The general proposition is that a province will not be permitted to use its legislative authority or even its proprietary authority to frustrate a work or undertaking which federal authorities consider to be in the national interest: *Campbell-Bennett v Comstock Midwestern Ltd*, [1954] SCR 207 and *AG Quebec v Nipissing Central Ry*, [1926] AC 715 (PC).”
 - N. Bankes, ABlawg.ca (2012)
- 2014: NEB releases Burnaby #1 decision
 - Notes trend towards “cooperative federalism” but applies paramountcy and IJI to Burnaby’s ticketing efforts;
 - Burnaby seeks leave to appeal to FCA → denied;
 - Burnaby seeks recourse in BCSC → dismissed JR as collateral attack (but also endorses NEB’s analysis in alternative);

- 2014: Quebec imposes 7 conditions on Energy East, inc. prov. EA;
 - “EA has long been understood in Canada as “simply descriptive of a process of decision-making”... There is no conflict between the requirements of the *NEB Act* and the *CEQ*; Trans Canada can comply with both. Doing so may seem duplicative but that is a matter of policy, not constitutional imperative.
 - M. Olszynski, ABlawg (2014)
- 2016: *Coastal First Nations v British Columbia*, 2016 BCSC 3
 - Main issue: interpretation of BC’s *Environmental Assessment Act*
 - Court suggests that BC may impose *some* conditions but cannot assess in abstract;
 - [47] ...with regard to the constitutional question, I agree that **absent concrete conditions... it would be premature** to make a finding...
 - [55] ... While I agree that **the Province cannot go so far as to refuse to issue an EAC and attempt to block the Project from proceeding**, I do not agree with the extreme position of NGP that this invalidates the *EAA* as it applies to the Project.
 - In applying paramountcy, distinction b/w “permissive regimes” and “positive entitlements” (at para 57);

- 2016: TMX approved by the federal Cabinet
- 2017 (Jan): BC imposes 37 conditions on TMX
 - This certificate has been challenged by First Nations;
- 2017: BC NDP campaigns on promise to “stop” TMX, forms government with Green Party support
- 2017/18: NEB releases Burnaby #2 decision and dispute resolution process
 - NEB deems delays in Burnaby’s permit process unreasonable:
 - “... it is only logical that delay in processing municipal permit applications can, in certain circumstances, be sufficient...to engage [paramountcy and IJI]. To hold otherwise would allow a province or municipality to delay a federal undertaking indefinitely, in effect accomplishing indirectly what it is not permitted to do directly.
 - Leave to appeal to FCA denied; Burnaby seeking leave to SCC

- 2018: BC launches public consultations re: additional regulatory measures, announces intention to submit constitutional reference to BCCA by end of April;

Proposed regulations under the Environmental Management Act

The following are proposed regulations under the Environmental Management Act (EMA) to improve liquid petroleum spill response and recovery:

1. Response times

Response times are the established timeframes within which response resources will be activated and arrive at a spill site. Currently, the Ministry of Environment and Climate Change Strategy does not regulate in this area. Establishing response-time requirements would align with practices of other regulators, and those in neighbouring jurisdictions.

2. Geographic response plans

Geographic response plans (GRPs) identify sensitive, natural, cultural, or significant economic resources at risk from spills. They outline the response actions that are appropriate for that site to minimize impacts to these resources, should a spill occur. GRPs are map-based, and each one has a variety of information that is useful to responders, particularly in the first 48 to 72 hours of a response.

3. Loss of public use

Loss of public use refers to the requirement that spillers provide some form of restitution for the impacts of spills on the use and/or enjoyment of public spaces and resources. These include the use of beaches, parks and forests, the enjoyment of wildlife, wilderness spaces, food resources, recreation and drinking water, as well as the intrinsic value of archaeological and cultural sites.

4. Marine application

The Province seeks to broaden existing ministry authority to ensure provincial interests are fully addressed in marine spill prevention, preparedness, response and recovery. While the primary responsibility for marine spills lies with federal agencies, a spill of any significance will impact and involve all orders of government. The provincial government has a responsibility to ensure there is a regulatory framework in place that protects its coastal resources.

5. Diluted bitumen transportation restrictions

The Province will create an independent scientific advisory panel to help address the scientific uncertainties outlined in the report, The Royal Society of Canada Expert Panel: The Behaviour and Environmental Impacts of Crude Oil Released into Aqueous Environments. The recommendations of the advisory panel will inform future regulatory development and approaches to spill response.

In order to protect B.C.'s environmental and economic interests while the advisory panel is proceeding, the Province is proposing regulatory restrictions to be placed on the increase of diluted bitumen ("dilbit") transportation.

Observations and Key Issues

- If cooler heads had prevailed...?
 - NEB has **demonstrated** capacity & capability for adjudicating disputes involving municipal/provincial issues;
 - Suggests that much of current controversy may indeed be “**political theatre**” or matters beyond pipeline regulation and safety (e.g. protests, blockades, etc...);
- Did BC NDP “Trump” itself?
 - What influence will public campaign to block TMX (before and after election) have on Court’s analysis re: validity of provincial regs?



- Agree with previous commentary that BC regulations unlikely to actually conflict (1st branch of paramountcy); rather are likely to be more strict (2nd branch):
 - Characterization of *NEBA* s. 52 CPCN regime as “permissive” vs. “positive entitlement” may prove determinative;
 - The legislative history of s. 92(10) and its basic purpose suggests the latter (see *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, [2009] 3 SCR 407 at paras. 31 – 39)
 - Repeated assertion that provinces/municipalities cannot say “no” → consistent with “positive entitlement”
 - Comprehensiveness of NEB review → consistent with “positive entitlement”

NEB conclusions and conditions re: spills

Project spill (i.e., from pipeline, tank terminals, pump stations, or Westridge Marine Terminal)	The Board finds that there is a very low probability of a Project spill (i.e., from pipeline, tank terminals, pump stations, or WMT that may result in a significant effect (high consequence). The Board finds this level of risk to be acceptable .	Local Regional	2 9 10 11
Spill from a Project-related tanker	The Board finds that there is a very low probability of a marine spill from a Project-related tanker that may result in a significant effect (high consequence). The Board finds this level of risk to be acceptable .	Local Regional	2 14

The Board is of the view that depending on weathering state and environmental conditions, spilled diluted bitumen could be prone to submergence in an aquatic environment. A number of parties filed evidence confirming this view. This potential for submergence must be considered in response planning.

Participants said that Trans Mountain had not demonstrated that its spill response would be effective. Some had differing views as to what an effective spill response would entail. The Board is of the view that an effective response would include stopping or containing the source of the spill, reducing harm to the natural and socio-economic environment to the greatest extent possible through timely response actions, and appropriate follow-up and monitoring and long-term cleanup. The Board is of the view that these elements are addressed in Trans Mountain's design of its response plans.

The Board has a comprehensive regulatory regime in place related to pipeline and terminal design, safety, spill prevention and spill preparedness and response. Trans Mountain would be subject to this regime.



Questions?

Thank you!