Pickerel, Pipelines and Pancakes: Proposed Federal Environmental Legislation

(and some comments on provincial jurisdiction over interprovincial pipelines)

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Environmental Law Centre's Green Regs and Ham

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Overview

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;

Timeline

- 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

Bill C-68 (*Fisheries Act*)

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-68 (*Fisheries Act*) cont'd

- **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…"

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

- **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.

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

- 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, *always* 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.

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

Other "modernization" elements:

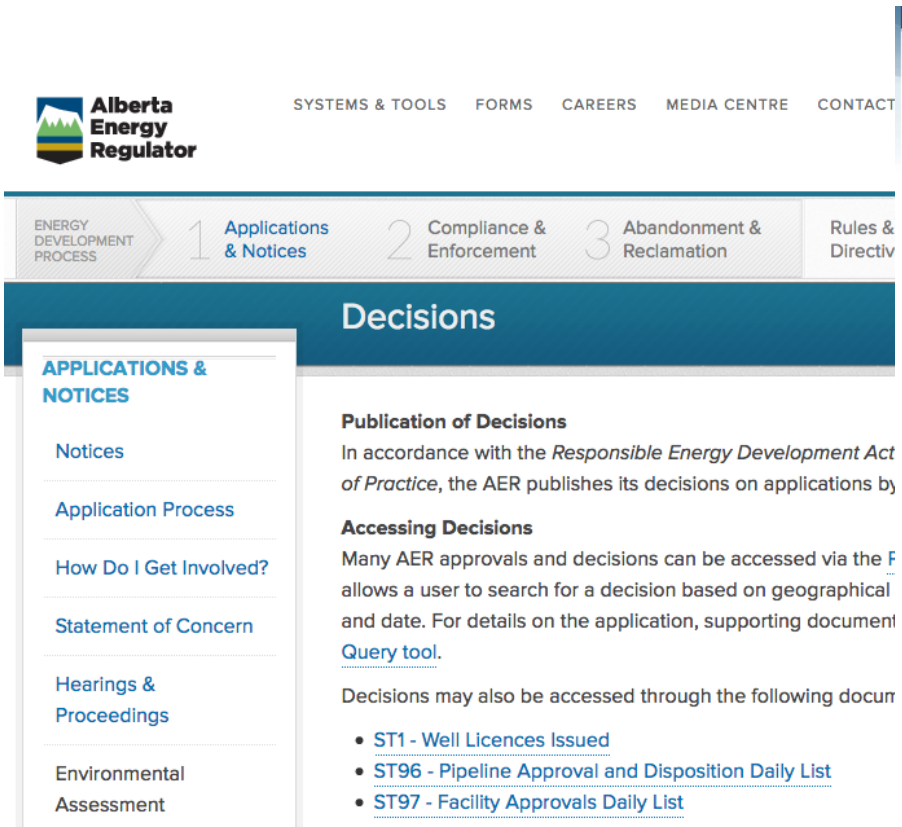
- Habitat Banking
  - "an area of a fish habitat that has been created, restored or enhanced by the carrying on of one or more conservation projects within a service area and in respect of which area the Minister has certified any habitat credit under paragraph 42.02(1)(b)".
  - Questions as to whether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

http://www.skagitfisheries.org/habitat-restoration/culverts/

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

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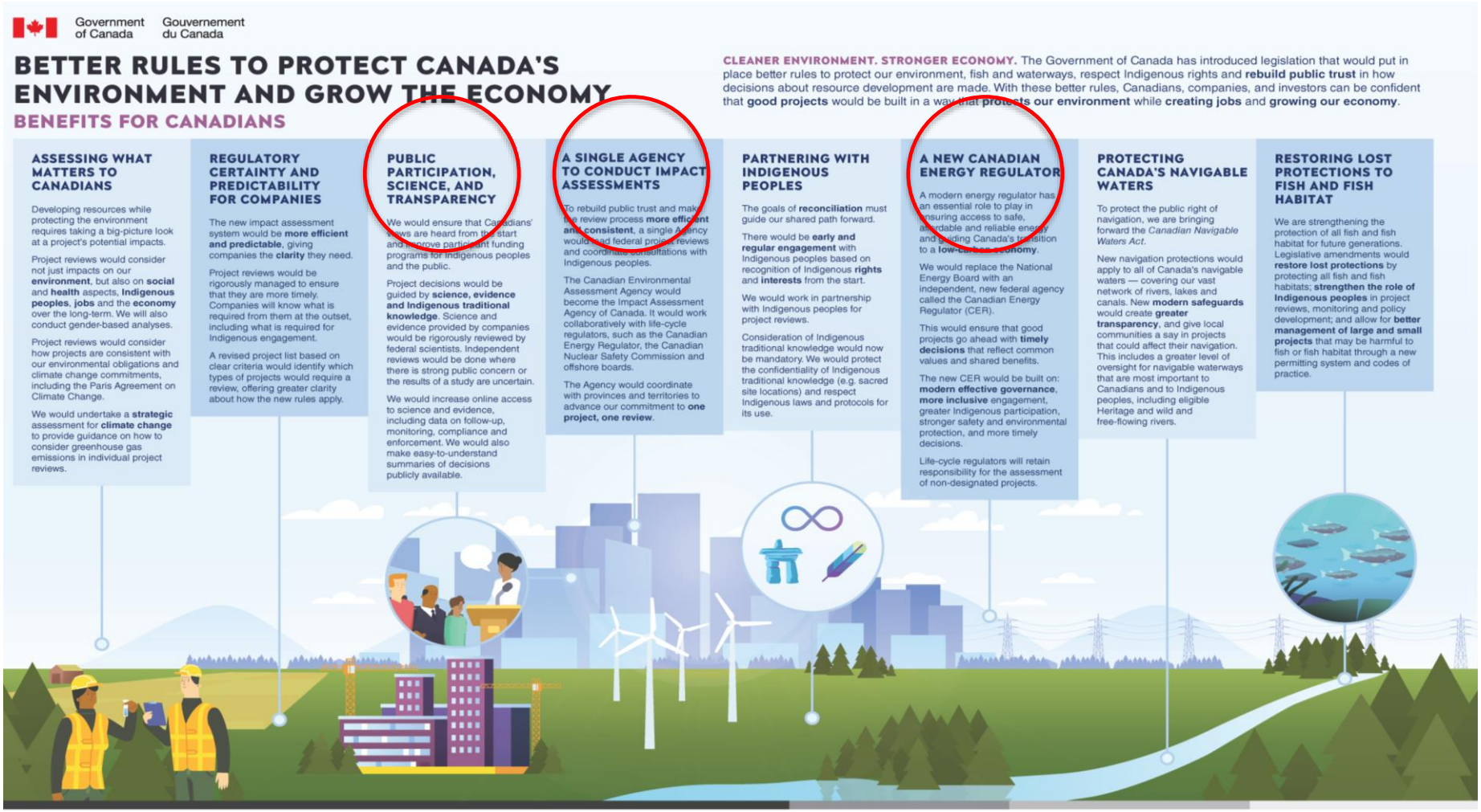
Bill C-69: *Impact Assessment Act (IAA)*



Snapshot: *IAA = CEAA, 2012+*

- 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 – [illegible] out the rel[illegible]t scheme;
  - Section 28: "inte[illegible]l party" p[illegible]ons – **standing test**
  - Section 29(1): conte[illegible] th[illegible]report:
    - (a) recommendations [illegible]ect to paragraph 31(1)(a);
    - (b) recommendation w[illegible]t to the follow-up program that is to be implemente[illegible]sp[illegible]the designated project.
  - Section 29(2): timi[illegible]d respo[illegible]minister
  - Section 29(3): F[illegible]ort is "final an[illegible]clusive" (**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…

IAA: Back to Panel Reviews

- 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);

Timeline cont'd

- 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);

Timeline cont'd

- 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

Timeline cont'd

- 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?

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Key Issues cont'd

- 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.

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Questions?

Thank you!