

**THE CANADIAN MARITIME LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DE DROIT MARITIME**

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**The Canadian Maritime Law Association ("CMLA") Response to Canada's
Ship-Source Hazardous and Noxious (HNS) Incident Preparedness and
Response Regime Discussion Paper - October 2011**

The Canadian Maritime Law Association

The Canadian Maritime Law Association (CMLA) was founded in 1951 by Canadians interested in Canadian and international maritime law. Our mandate is to promote effective modern maritime laws within Canada and internationally. CMLA is Canada's representative association to Comité Maritime International, known as CMI, a private non-governmental international organization founded in Belgium in 1897 whose main purpose is the promotion of uniformity in and unification of international maritime law.

CMLA has two groups of members – individual and constituent. Our individual members represent all facets of the Canadian Marine industry including maritime lawyers, members of the marine insurance community, marine average adjusters, ship operators and suppliers and others. Our constituent members are associations with particular but varying interests in maritime matters. They include: The Association of Average Adjusters of Canada, The Association of Maritime Arbitrators of Canada, The Canadian Bar Association, The Canadian Board of Marine Underwriters, Canadian International Freight Forwarders Association Inc., The Canadian Merchant Service Guild, The Canadian Shipowners

Association, Chamber of Shipping of British Columbia, Marine Insurance Association of British Columbia, The Company of Master Mariners of Canada and The Shipping Federation of Canada.

CMLA has a very broad constituency. It is not a lobby group for any particular interest.

Introduction and Background

The CMLA has consistently spoken out in favour of pollution control since Canada's first marine pollution legislation was enacted in the 1970s. We took an active role in the redrafting of the *Canada Shipping Act, 2001* which is Canada's principal legislation prohibiting ship-source pollution. We have also been actively engaged with respect to amending legislation (such as Bill C-7) promoting changes to and development of the *Marine Liability Act*.

The HNS Convention was adopted under the auspices of the IMO in 1996 in response to a perceived gap in the marine liability system to compensate claimants in the event of spills involving chemical and other hazardous substances. Canada signed the HNS Convention in 1997 following consultation with industry stakeholders. However, as a result of primarily three concerns, the 1996 Convention was not ratified or implemented. A Protocol was developed to address the issues raised inhibiting entry into force of the HNS Convention, particularly:

1. levies for LNG cargos are imposed on the title holder of the cargo immediately prior to discharge, but many such title holders may not be under the jurisdiction of Contracting States thereby potentially frustrating the ability of the HNS Fund to collect levies from them in the case of an LNG incident;
2. difficulty with ascertaining exact figures on the quantity of packaged HNS received in states at any given time. This is attributable to the uncertainty of the identity of receivers of packaged HNS goods, given the highly complex logistics chain involved in the transportation of packaged goods; and
3. concerns over the integrity of cargo reports that threaten the integrity of the scheme.

The 2010 HNS Protocol to the HNS Convention addressed these practical problems and was adopted by the IMO at a diplomatic conference held on April 26-30, 2010 in London. The CMLA was invited to and did send a representative to join the Canadian Delegation at the diplomatic conference and was able to witness the tremendous work carried out by the permanent members of the Canadian Delegation throughout the conference.

The 2010 HNS Protocol establishes a shared liability regime to compensate claimants for damages arising from the carriage of HNS by seagoing vessels. Under the regime, tier 1 liability is combined with the HNS Fund made up of contributions from receivers or importers of HNS cargo (referred to as tier 2 liability). This two tier model of compensation is similar to the structure of other international conventions adopted by Canada, such as CLC and the IOPC Fund. Under Canada's current legal regime, shipowners' limits of liability for pollution damage for HNS is set out in Part 3 of the *Marine Liability Act*.

The CMLA acknowledges the example set out in Transport Canada's preceding Discussion Paper dated October 2010, namely: the maximum liability of a vessel of 20,000 gross registered tonnes would be about \$16,000,000, compared to \$74,000,000 under tier 1 of the HNS Convention. Combined with tier 2, the maximum compensation under the HNS Convention would be \$500,000,000.

The CMLA is pleased that on October 25, 2011, Canada took part in a signing ceremony with four other states at the IMO in London to sign, subject to ratification, the 2010 HNS Protocol.

Response and Discussion

On behalf of the CMLA, we herewith provide our response, commentary and input regarding the questions posed for discussion by Transport Canada in its October 2011 Discussion Paper.

1. Do you agree with the proposed list of HNS preparedness and response regime policy principles in the Discussion Document? If not, which ones would you change and/or add?

CMLA Response: The CMLA agrees with the proposed list of HNS preparedness and response regime policy principles contained in the Discussion Document. Each policy principle identified in the Discussion Paper is very important to the development and implementation of an effective response regime.

2. Is Canada's existing oil spill response regime (*public-private delivery model under government leadership*), including the "Response Organization" concept, a useful model for addressing HNS incident preparedness and response?

CMLA Response: The position of the CMLA is that Canada's existing oil spill response regime concept is generally a useful model and starting point for addressing HNS incident preparedness and response. The position of the CMLA is that a similar concept and integrated regime should apply to HNS spill response.

3. Should Transport Canada seek a single, integrated regime that would cover both oil spills and HNS incidents?

CMLA Response: When taken from a cumulative annual basis, both oil and HNS spill incidents are, fortunately, relatively rare in Canada. As spill incidents are few, the position of the CMLA is that a single, integrated response regime applicable to both oil and HNS represents the most efficient use of scarce resources. The position of the CMLA is that the Ship-Source Oil Pollution Fund ("SSOPF") is under-used and should be considered to play an additional role for HNS cargoes. The SSOPF already will play a small response part in that HNS includes oil where the damage (fire, personal injury) is not covered by the CLC Convention. The CMLA believes that the SSOPF could play the same role for HNS as it does for oil – it could be a fund for ship-sourced spills in general under both the CLC and HNS Conventions. The CMLA respectfully suggests that consideration be given to changing the name of the SSOPF to the "Ship Sourced Pollution Fund" ("SSPF").

4. Should the regime for HNS incident preparedness and response be a public model, a private model or a mixed public-private model? What are the main arguments in support of your position?

CMLA Response: It is the CMLA's view that the most appropriate model for an HNS spill regime is a mixed public-private model. This would be mostly private first response with public backup and overview by Transport Canada. The position of the CMLA is that having private input is one of the best methods to ensure that remote regions and areas are properly covered. In addition, private parties will have existing expertise and equipment to expedite HNS spill response particularly in remote areas.

5. What specific elements/components should be included in Canada's preparedness and response regime?

Elements such as:

- requirements to report on HNS shipments, to support a real-time data base of HNS movements in Canadian waters
- requirements to carry and implement on-board HNS incident emergency plans
- the Canadian Coast Guard's 2011 National Contingency Plan
- training and certification requirements for private-sector personnel and response organizations

CMLA Response: The CMLA agrees with the elements listed and discussed by Transport Canada regarding the design of the spill response regime. With respect to the Canadian Coast Guard's 2011 National Contingency Plan, the CMLA believes that a similar custom contingency plan for HNS should be developed. Once the regime is in place, then it ought to be straightforward to administer. The initial effort and time will be required for development and implementation.

6. Are there any program elements that you do *not* recommend for inclusion and why not?

CMLA Response: The CMLA, at this time, is not aware of any additional program elements that should not be recommended for inclusion. The key here is efficient and effective collaboration of the elements identified by Transport Canada.

7. If a phased-in approach was used, should the focus be on vessel shipments in isolation from ports and chemical handling facilities?

CMLA Response: The CMLA's position is that a phased-in approach is the most sensible given the scarce resources and the cost to allocate these resources. The position of the CMLA is that the focus should be on both vessels and facilities as both are extremely and equally important elements. In addition, the CMLA believes that it is important to identify priority regions (such as the emerging export port of Kitimat and existing major port facilities) and not to initially focus on specific products or cargoes or volumes of cargoes. The spill response mechanism and procedure is, in the vast majority of cases, likely to be similar notwithstanding the nature of the product. Once a working, integrated, key regional system is operative, then specific cargoes and smaller ports/areas can be targeted.

8. What would you say are the priority substances for coverage?

CMLA Response: The CMLA's position is that chemical substances should be priority substances for coverage, at least initially.

9. Should low-impact products, such as coal and wood-pulp, be excluded entirely?

CMLA Response: The CMLA believes that low impact products such as coal and wood-pulp should not be excluded entirely but should be given a low priority and ought to be phased in over time as resources allow.

10. Should requirements apply to shipments of packaged goods or only to bulk shipments?

CMLA Response: The position of CMLA is that the regime requirements should apply to bulk cargo first. Transport Canada should then consider the application of the HNS regime to packaged goods in the future.

11. What should be the threshold (e.g. size of shipment, size of vessel)?

CMLA Response: The CMLA's position is that the size of the shipment ought to be the threshold.

[CMLA notes that there is no question 12 for response.]

13. Should northern regions of Canada (including the Arctic) be excluded from the application of some or all components of an HNS regime? If so, which components and why?

CMLA Response: The CMLA's position is that it is necessary to close the data gap regarding the volume and type of products that are shipped, or that may in the future be shipped, north of 60° latitude. If the volumes and/or types of cargo warrant, then the HNS response scheme should be phased in over time. It is CMLA's position that, at present, unless very exceptional circumstances exist with respect to a particularly dangerous product or port facility, the application of the regime north of 60 should be given a low priority. The CMLA notes that the current oil spill model may be prudent for regions north of 60° latitude whereby the government is responsible for the spill response.

14. Who should be required to contribute financially to HNS incident preparedness and response?

CMLA Response: The position of the CMLA is that owners and receivers should be required to contribute financially to HNS incident preparedness and response. Insurance will be a critically important component of the response in compensation scheme. This is another area where a public-private partnership will be a very important factor to consider.

15. Have you any advice on how that contribution should be made, for example, an industry-administered fund? Through a government levy on HNS shipments?

CMLA Response: Both the concept of an industry-administered fund and the concept of a government levy on HNS shipments are good options for how financial contributions to HNS incident preparedness and response should be made. The position of the CMLA is that both options should be considered further in collaboration with key stakeholders. Here, again, the oil model, with mandatory authorized representatives and response organizations charging government-approved bulk cargo fees for receiving bulk oil shipments, is illustrative and could be considered for extension to HNS cargoes.

16. In order to prepare for and respond to trans-boundary marine pollution incidents involving HNS, should Canada seek more integrated arrangements with US authorities?

CMLA Response: The CMLA believes that it is very important to synchronize, as much as possible, Canada's HNS response regime with that in the USA.

17. Are there other aspects of regime principles, regime design, and implementation you would like to share? Is there any other advice you would like to provide on how to proceed?

CMLA Response: From the CMLA's perspective, it is very important to ensure continued stakeholder discussion and input. Transport Canada should do whatever is necessary to ensure that it receives, considers and implements, as necessary, the views of industry (shippers and receivers) and vessel owners and charterers. This type of effective communication and collaboration is key to a workable and effective HNS response regime.

Thank you for the opportunity to provide this input. We would be pleased to discuss any questions or concerns Transport Canada may have at your convenience.

CANADIAN MARITIME LAW ASSOCIATION



Per: Christopher J. Giaschi
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