
West Coast Environmental Law

Building a leading-edge approach, achieving a climate-safe future

Comments on Developing a Strategic Assessment of Climate Change Discussion Paper

August 31, 2018

INTRODUCTION

We commend the federal government for fulfilling its commitment to initiate a strategic assessment of climate change (climate SA) in order to better identify how to consider climate implications of projects in impact assessments. We are pleased to submit these comments on how to design the climate SA in order to ensure transparency and buy-in of results, and achieve the necessary framework for triggering, assessing and making decisions about projects in such a way that ensures project approvals are consistent with Canada's climate commitments and goals.

West Coast Environmental Law Association (West Coast) is a British Columbia-based non-profit environmental law organization dedicated to safeguarding the environment through law. One of Canada's oldest environmental law organizations, West Coast has provided legal support to British Columbians to ensure their voices are heard on important environmental issues and worked to secure strong environmental laws for over 40 years.

CLIMATE SA DESIGN

Transparency, rigour, a willingness to depart from the status quo, and buy-in from interested sectors, including the public, industry, provinces and Indigenous peoples is of critical importance to achieving a framework that helps decision-makers and assessment authorities determine whether a project helps or hinders Canada's ability to achieve its climate goals and obligations. We were pleased to see the proposal in the Discussion Paper to appoint an expert advisory panel to conduct the climate SA, but have concerns about the methods proposed.

The Discussion Paper seems to indicate that the expert advisory panel's role would be quite limited in the assessment. It proposes that a draft report would be published in the fall, before the panel is appointed and its terms of reference drafted. Presumably, this report would be drafted by ECCC. Then, it appears that the expert panel would conduct engagement on the draft report, then submit a final report to the Minister.

This approach is problematic for many reasons. The climate SA is being touted as a first strategic assessment under the new approach set out under the *Impact Assessment Act* (IAA. Although the Act will not be in force until after the climate SA is completed, it appears that the government is considering it to be a precursor to strategic assessments under it.) The IAA also purports to promote meaningful public participation and cooperation with other jurisdictions, including Indigenous peoples.

Internally preparing a draft report *before* deep public engagement has occurred is contrary to the principles and practice of meaningful public participation and collaboration. Nor is it in any way strategic. If the government truly intends to meaningfully engage the public under the IAA and undertake *strategic* assessments (as opposed to review of decisions already made) it must set the right precedent by meaningfully engaging the public on the climate SA.

Aside from this welcome comment period on the Discussion Paper, meaningful engagement in this case means engagement on the terms of reference of the expert panel, an initial scoping period by the expert panel on the main issues and questions it should address, engagement on substantive solutions and responses to those issues and questions, and engagement on the draft outcomes. In each of those engagement periods, the public should be offered opportunities to participate in-person as well as online or through written comments. Summaries of engagement should be made public, and the authority (ECCC or expert panel, as the case may be) should justify decisions in light of what they have heard.

Accordingly, the next step should be engagement on the expert panel's terms of reference. For the assessment to be strategic in nature, those terms of reference should be broad and not preclude investigation into any relevant matter. For example, the Discussion Paper states that downstream emissions will not be assessed. Respectfully, it is premature to determine that certain emissions, methodologies or other issues are off the table before the assessment has even begun.

Panel composition is also important. Given the wide range of issues relating to assessing climate, a panel of 5-7 members is likely an appropriate size. Members should include Indigenous representation, as well as diverse perspectives and expertise.

After the panel has been appointed, it should be free and mandated to undertake broad engagement, as well as deeper engagement with experts. It should have the resources and ability to retain experts to provide advice, as well as travel if necessary. Engagement should include all relevant sectors and interests, in order to help achieve buy-in of results. As recommended above, engagement should begin early, including on the issues and questions to be addressed in the climate SA, alternative approaches, and solutions. A public comment period on the draft report is critical, as is justification by the federal government on any decisions taken to depart from the climate SA report when implementing climate measures in regulations or policy.

In summary, we echo the submission of Environmental Defence that the climate SA panel should:

- Be composed of five to seven members, including a chair and vice-chair, or co-chairs;
- Constitute a range of perspectives and areas of expertise, such as Indigenous knowledge, environmental assessment, climate change, climate risk, economics, finance, energy modelling, sustainability, just transition, etc. The expert panel could include representation from the oil and gas industry, but with a clear understanding of the SACC being framed around mid-century decarbonization;
- Have secretariat support from CEAA or ECCC;
- Have authority and resources to commission expert reports, studies and analysis, with funding committed early and in such a way that the panel can nimbly retain experts when and as needed;
- Undertake workshops in key cities in Canada in order to engage the public and Indigenous groups with relevant experience and expertise (3-4 months);

- Consist of at least one Indigenous member;
- Be given broad Terms of Reference, expertise, independence and authority to identify key questions and propose solutions regarding how to assess climate in the IA of individual projects; and
- Report back on what the panel hears and how the information it collects is applied to outcomes.

CONSTITUTIONAL CONSIDERATIONS

It is increasingly obvious that climate change brings with it significant risks to human life, health and safety. As such, we are of the opinion that measures related to the increase or decrease of greenhouse gases engage section 7 of the *Canadian Charter of Rights and Freedoms*.¹ Section 7 provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Seen from this perspective, any IA that authorizes a project with emissions of greenhouse gases should do so in a manner that is consistent with the principles of fundamental justice. Since the SA provides guidance on that process, the SA may be seen as a means of achieving those principles and it is crucial that it be sufficiently fair and effective to meet the requirements of fundamental justice.

We acknowledge that there is uncertainty regarding what the principles of fundamental justice require in cases involving an increased environmental risk,² but we feel that it is increasingly likely that courts will be open to reviewing the section 7 implications of IAs of fossil fuel-generating projects and that a rigorous and transparent SA will help guard against such challenges.

These underlying constitutional obligations underscore all of the submissions that follow.

SUBSTANTIVE ISSUES

It is important to note that the overarching question that the climate SA should be seeking to answer is how to best ensure that project-level decision making is consistent with our Paris Agreement obligations and how to protect the rights of present and future generations of Canadians. Put in the language of the IAA, the climate SA should provide the Agency, panels, the Minister and Cabinet with the tools and information they need to be able to determine “the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.”

¹ M. Slattery. Pathways from Paris: Does Urgenda lead to Canada? 30 J. Env. L. & Prac. 241 (2017); D. Klautt. Can Canada’s “Living Tree” Constitution and Lessons from Foreign Climate Litigation Seed Climate Justice and Remedy Climate Change? 31 J. Env. L. & Prac. 185 (July 2018); L. Collins. An Ecologically Literate reading of the Canadian Charter of Rights and Freedoms. 26 Windsor Rev. Legal & Soc. Issues 7 (2009); A. Nanda. Heavy Oil Processing in Peace River, Alberta: A Case Study on the Scope of Section 7 of the Charter in the Environmental Realm. 27 J. Env. L. & Prac. 109 (April, 2015).

² See Gage, A. Public Health Hazards and Section 7 of the Charter. 13 Journ. Env. Law and Practice 1 (2003) at pp. 33-46 for discussion of the procedural principles of fundamental justice which may apply in public health cases.

This determination entails asking both the extent to which the project helps or hinders the achievement of mid-term goals, such as the 2030 goal set out in the Pan-Canadian Framework on Clean Growth and Climate Change. The SA should also examine the adequacy of those interim targets, both in terms of what Canada’s “fair share” of emissions at 2030 would be, in terms of whether they provide sufficient short-term direction to decision-makers, and how to determine the extent to which projects contribute to that goal, well as the mid-century Paris Agreement goal of carbon neutrality. Making these determinations involves multiple stages of assessment: triggering, identification of alternatives, information gathering and analysis, decision-making, and follow-up. We explore each of these stages below.

Triggering

The climate SA panel should be tasked with identifying different means of triggering assessments based on climate implications. Recommended options include:

1. Projects with projected annual direct and indirect emissions of 50,000 tonnes of CO₂ equivalent or more; and
2. Projects with projected annual direct and indirect emissions over its lifespan that are inconsistent with progressive emissions decline (e.g., emissions of a certain threshold in 2030, 2040 and 2050).

Impact assessment contributes multiple advantages beyond just imposing conditions respecting mitigation, best available technology and best environmental practice. Done right, impact assessment can help identify preferred alternatives and issues of concern, provide a means of meaningfully engaging the public and securing buy-in, advance reconciliation, ensure the integrity of the evidentiary basis, and address cumulative effects. Therefore, projects belonging to certain sectors, projects in regions with carbon caps or taxes, or projects that use standard mitigation measures, best available technologies or best environmental practices should not be exempted from assessment on those bases. Not only would allowing BAT/BEP or other matters exempt projects undermine the purposes of the IAA, it would also send the message to other industries that carbon-intensive industries like oil and gas can continue to get a free ride.

If BAT/BEP considerations are relevant at all, it may be in making choices between particular projects to determine which should be prioritized for inclusion within a strict carbon budget. Considering BAT/BEP in the abstract, and without reference to a carbon budget, breaks the connection between the consideration of a project’s climate impacts and Canada’s climate goals. Considering BAT/BEP within the context of carbon budgets allows rational choices to be made about how to achieve the carbon budget/climate goals. (Carbon budgets are discussed further below).

Identification of alternatives

The climate SA panel should also be tasked with means of identifying reasonable alternatives to emissions-intensive projects that can better help advance Canada’s progress towards our climate goals. For example, if assessing a project like a pipeline to transport natural gas to displace a coal-fired generation plant, should renewable energy alternatives like wind or solar be assessed instead? How can proponents for such alternatives be identified? Where public utility proponents have already undergone integrated resources planning and determined that certain alternatives should not be on the table, how can members of the public, Indigenous peoples and stakeholders be afforded an opportunity to have those alternatives be meaningfully

considered? Again, this is part of a rational and transparent discussion about how to achieve climate goals.

Information gathering and analysis

Direct and indirect emissions

Firstly, to preclude investigation into whether, when and how downstream emissions could and should be assessed undermines the strategic nature of the proposed assessment. Other jurisdictions have considered downstream emissions have been considered in assessments,³ and the review panel of the Energy East pipeline project concluded should be examined in that assessment, too.⁴ To be truly strategic in nature, the climate SA should examine all reasonable options, including whether, when and how downstream emissions should be assessed in impact assessments.

Moreover, to the extent that climate-related decisions are governed by s. 7 of the Canadian Charter of Rights and Freedoms, or other constitutional constraints, the courts are likely to be more concerned with whether emissions compromise the right to life, liberty and security of the person, than whether they are upstream or downstream.

Secondly, Question 1 is framed too narrowly. Asking which projects should undergo an upstream assessments assumes that certain project types should be exempt from upstream GHG and climate analysis. Instead, the panel should be tasked with identifying the types of upstream emissions and impacts (e.g., on carbon sinks) that should be scoped into assessments, methodologies for assessing those impacts, and other relevant matters. The IAA introduces an assessment planning phase, a major purpose of which is to identify key issues and produce tailored impact statement guidelines for individual project reviews. It should be in that phase that the Agency determines whether upstream emissions are a relevant issue, and how those impacts should be assessed.

Managing and communicating uncertainty

Section 6(2) of the IAA requires the Government of Canada, the Minister, the Agency and federal authorities to apply the precautionary principle when exercising their powers. The precautionary approach is a well-recognized tool for dealing with uncertainty.

The 1990 Bergen Ministerial Declaration on Sustainable development defines the precautionary principle as:

“Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation.”⁵

³ Michael Burger and Jessica Wentz, “Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review” (2017) 41 Harv Envtl L Rev 109.

⁴ Government of Canada, “Expanded focus for Energy East assessment” (27 August 2018), online: https://www.canada.ca/en/national-energy-board/news/2017/08/expanded_focus_forenergyeastassessment.html.

⁵ Bergen Ministerial Declaration on Sustainable development (1990) at ART 7; Conference on "Action for a Common Future," Bergen, Norway, May 8-16, 1990.

There are two crucial conditions that must be met in order to trigger application of the principle: 1) a threat of serious or irreversible harm, and 2) a lack of full scientific certainty.⁶ That climate poses a threat of serious and irreversible harm, and that incremental GHGs and land use changes contribute to climate change is uncontested by any credible scientist. A precautionary approach should be applied to the identification of upstream activities that should be assessed, by asking whether there is “reasonable scientific plausibility” that the project will result in the activity, emission or climate impact,⁷ and weigh the degree of uncertainty against the magnitude of the potential effect. As the New South Wales Land and Environment Court in Australia has held, the application of precaution should be proportionate to the environmental risk.⁸ In other words, the more significant and uncertain is the threat, the greater is the degree of precaution required.⁹ In the case of climate change, the severity of the threat and need for imminent action favours a high degree of precaution. In other words, assessments should err on the side of scoping activities in, rather than out.

Economic analysis

In addition to information about GHG intensity and sources, the climate SA should investigate how to determine whether a project will be economically viable should Canada, as well as other ratifying countries, be compliant with their Paris Agreement obligations. For example, proponents’ need-for and economic analysis often assume markets for petroleum products that would not be possible in a Paris-compliant world. The climate SA should establish guidance to ensure that any economic analysis and need-for case assume that Paris Agreement obligations are met.

Further, the climate SA should identify a social cost of carbon (SCC) as a means of discounting any economic advantages of the project. This SCC should be calculated based upon a precautionary approach and with the rights of youth and future generations given a high level of protection. We note that the federal government has calculated the social cost of carbon policy at a “central” value of \$45.10 in 2020. In our view this calculation, which applies a heavy discount rate to both economic values but also human lives, is discriminatory against youth and future generations (since it values their lives at less than older Canadians).¹⁰ Different SCCs exist in the world, and economic analyses in IA would benefit from guidance on the strongest SCC to apply.

Decision-making

Perhaps the biggest obstacle to determining a project’s contributions to climate change and the extent to which they help or hinder Canada’s ability to meet its climate obligations is the lack of a framework for contextualizing its emissions. Despite its having ratified the Paris Agreement and submitted its first Nationally Determined Contribution of 524 Mt in 2030, Canada has

⁶ Charles Birchall *et al*, “Navigating Environmental Risk: When and How to Apply the Precautionary Principle” (December 22, 2017), online: <https://www.willmsshier.com/docs/default-source/articles/navigating-environmental-risk-when-and-how-to-apply-the-precautionary-principle---cjb-jd-ja-and-rj---december-22-2017.pdf> at 3, 16.

⁷ From *Telstra Corporation Limited v Hornsby Shire Council*, [2006] NSWLEC 133 at para 131.

⁸ *Telstra* at para 166-67.

⁹ *Telstra* at para 161.

¹⁰ Discussion of the discriminatory nature of SCC as calculated by the U.S. Environmental Protection Agency may be found in Johnson, L.T. & Hope, C. J *Environ Stud Sci* (2012) 2: 205. <https://doi.org/10.1007/s13412-012-0087-7>.

continued to approve GHG-intensive projects, such as Kinder Morgan’s Trans Mountain pipeline and tankers project and the Pacific NorthWest liquefied natural gas project on the north coast of BC, which together would increase Canada’s emissions by over 4% a year. That figure does not even count indirect emissions, such as the climate effects of upstream land use changes like deforestation, or the downstream emissions from when the oil and gas transported are burned.

In order to better understand a project’s emissions within the broader context of all the other projects and activities contributing to Canada’s overall GHGs, Canada needs sectoral and regional carbon budgets, with which a project would need to demonstrate that its emissions are consistent and take up no more than its fair share, without compromising other proponents’ ability to seek approvals. Rather than emissions thresholds, as the Discussion Paper suggests, the climate SA should seek to identify sectoral and regional carbon budgets along periodic (e.g., five year) time periods.

Carbon budgets are increasingly recognized as a best practice in climate planning, having been adopted in several different countries. In the United Kingdom’s *Climate Change Act 2008*, Carbon Budgets, along with other accountability measures, have been credited with reducing GHG emission levels to 1890 levels.¹¹ Best practices for carbon budgets are discussed in greater detail in our report, *A Carbon Budget for Canada*.¹²

Additionally, the climate SA should investigate how to weigh emissions against other impacts. For example, if a project such as a hydroelectric project proposes to replace GHG-intensive coal-fired generation, how should that climate benefit be weighed against increases in methylmercury levels in water sources due to the project’s reservoir?

Follow-up

Finally, the climate SA panel should be tasked with identifying how follow-up and monitoring can contribute to ongoing learning about climate mitigation and assessment. It should also ask what emissions should be tracked post-assessment, and how to continually seek to reduce emissions post-assessment.

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¹¹ <https://www.policynote.ca/a-carbon-budget-framework-for-bc-achieving-accountability-and-oversight/>.

¹² <https://www.wcel.org/publication/carbon-budget-canada-collaborative-framework-federal-and-provincial-climate-leadership>.