

Preliminary Recommendations for Improving Impact Assessment Agency of Canada Guidance on Assessing Projects' Impacts on Canada's Ability to Meet its Environmental Obligations and Climate Change Commitments

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Introduction

The Impact Assessment Agency of Canada (Agency) is currently reviewing its guidance, “Policy Context: Considering Environmental Obligations and Commitments in Respect of Climate Change under the Impact Assessment Act”¹ (EOCC Guidance) with the goal of making targeted fixes based on expert review and experience gained since the *Impact Assessment Act* (IAA) was enacted in August 2019. These recommendations by the Environmental Planning and Assessment Caucus of the Canadian Environmental Network (the Caucus) are made pursuant to the Memorandum of Understanding between the Agency and the Caucus signed February 2020. They begin with what are intended to be targeted fixes to the existing guidance, then identify larger policy and guidance gaps and approaches for addressing those gaps. The recommendations would breathe life into the notions of “obligation” and “commitment,” ensuring the connection between these requirements and the effects of projects.

Targeted Amendments

Have the Agency identify EOCCs, not just instruments

Recommendation 1: Amend the language of the EOCC Guidance to have the Agency identify the specific relevant commitments and obligations arising under international or domestic instruments during the planning phase, and not limit guidance to mention of international or domestic instruments.

¹ Online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/considering-environmental-obligations.html> [EOCC Guidance].

The EOCC Guidance currently states that, during the planning phase, the Agency will identify in the TISG “which international or domestic instruments contain environmental obligations or climate change commitments that require consideration in the impact assessment of a designated project.”² It also states that the Agency will provide “direction to the proponent, as part of Tailored Impact Statement Guidelines, in relation to the instruments that include environmental obligations or commitments in respect of climate change that will require consideration in the impact assessment of a designated project.”³ This guidance is consistent with the three TISGs that have been issued to date, which simply describe international and domestic instruments, rather than the specific EOCCs arising under each.

International and domestic instruments are often lengthy and complicated, and in many the EOCC that are relevant to a particular project - or even any impact assessment - will be buried within dozens, if not hundreds of irrelevant provisions. For example, the Convention on Biological Diversity has 42 articles, and article 8 alone (in-situ conservation) has 13 subsections. Among these, only a handful may be relevant to a particular IA.

Leaving the task of identifying relevant EOCC within the identified instruments to the proponent is unfair to and unrealistic for the proponent, public and Indigenous peoples alike. For the public and Indigenous participants, it risks having the proponent deliberately or accidentally omitting important EOCC, or inappropriately focusing on less important or relevant ones. As a result, it places an unfair and unrealistic burden on participants to identify relevant EOCC within the instruments, determine which are relevant, and ensure an appropriate evidentiary base for assessing the project’s influence on that EOCC. For the proponent, it means placing an unfair and equally unrealistic burden on it to know and identify which EOCC are relevant. As the EOCC are Canada’s, not the proponent’s, the task of identifying them properly lies with the Agency with the assistance of federal expert departments.

Requiring the Agency to identify relevant EOCC rather than simply the broader instruments within which they occur would better ensure that the IA considers those EOCC and is done based on appropriate evidence, while providing clarity to all parties at the outset what are the relevant EOCC. It would also align with the important purpose of the planning phase to tailor the assessment so it focuses on key issues.

Determining relevance

Recommendation 2: Include a framework for determining the relevance of an environmental obligation or climate commitment (EOCC)

Recommendation 3: When determining relevance, connect EOCC to valued components and effects and presume all EOCC are relevant until proven to be irrelevant

² *Supra* note 1, Table 1.

³ *Ibid*, s 3.

Recommendation 4: Include a policy that the Agency will provide public reasons for a relevance determination

The EOCC Guidance states that impact assessments (IAs) will consider relevant environmental obligations and climate commitments (EOCC), but it does not state how the Agency will determine the relevance of EOCC. Notably, none of the tailored impact statement guidelines (TISG) for the three projects that have completed the planning phase mentioned the Paris Agreement, and none was accompanied by a rationale explaining which EOCC were selected and which were deemed not relevant.⁴ Being consistent and transparent in the identification of relevant EOCC is critical to an assessment's credibility and public buy-in of the results.

The EOCC Guidance should state the criteria by which the Agency will determine the relevance of EOCC and commit the Agency to providing public reasons for its relevance determination, including which EOCC were considered and the rationale for inclusion or exclusion from the TISG. Alternatively, the Agency could publish a list of factors the Agency must consider when determining EOCC relevance, similar to its guidance on its process for advising the Minister on designation requests in the "Operational Guide: Designating a Project under the Impact Assessment Act."⁵

To be most effective, relevance must be directly linked to the tailoring process. The requirement to assess a project's contributions to Canada's ability to meet its EOCC is mandatory; relevant EOCC cannot be excluded. As a result, if the planning phase identifies that a valued component or effect is relevant to the assessment and an EOCC relates to that component or effect, the EOCC should be also considered relevant. It is important to remember that the planning phase occurs before substantive information-gathering and analysis has occurred, and initial relevance determinations are therefore made based on incomplete information. A precautionary approach - an important purpose of the IAA - would be to presume a EOCC is relevant if the issue to which it pertains is also found to be relevant.

Because of the importance of the EOCC factor, as noted above we also recommend that the Agency make its relevance determination public. In its reasons, the Agency should list all EOCC that were identified by participants, other authorities, federal or other experts, or Indigenous peoples during the planning phase, list those EOCC the Agency determined were relevant, and provide reasons for excluding any EOCC from the TISG.

It may also be helpful to provide examples of environmental obligations or climate commitments that will likely always be relevant. For example, the template tailored impact statement guidelines refer to biodiversity effects stemming from changes to the riparian, wetland, terrestrial and marine

⁴ They are the Gazoduq Project (<https://iaac-aeic.gc.ca/050/evaluations/proj/80264>); Marten Falls Community Access Road Project (<https://iaac-aeic.gc.ca/050/evaluations/proj/80184>) and Webequie Supply Road Project (<https://iaac-aeic.gc.ca/050/evaluations/proj/80183>).

⁵ Online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/designating-project-impact-assessment-act.html>.

environments,⁶ as well as effects on fish biodiversity, bird biodiversity, terrestrial wildlife biodiversity and species at risk,⁷ making it highly likely that obligations under the Convention on Biological Diversity will be relevant to most, if not all, assessments. Similarly, given that the project list regulations are designed to apply only to particularly large projects, it is highly likely that the Paris Agreement and the Protocol between the Government of Canada and the Government of the United States of America Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States⁸ will be relevant to most, if not all, assessments. See our recommendations under “Gaps and Broader Needs” respecting our recommendation that the Agency make public a list of all of the Government of Canada’s substantive EOCC potentially relevant to project assessment.

The SACC does not replace Canada’s climate commitments

Recommendation 5: Revise the EOCC Guidance to clarify that while the SACC describes climate-related information requirements, Agency and review panel assessments will consider such federal climate commitments as those arising under the Paris Agreement.

As noted above, the three TISGs issued to date under the IAA omit the Paris Agreement and other instruments containing federal climate commitments, despite the fact that all three projects will have climate implications. The EOCC Guidance states that the Strategic Assessment of Climate Change (SACC)⁹ “will provide direction on the scope and level of information required on greenhouse gasses and climate change,” which “will inform the consideration of Canada's climate change commitments under the *Impact Assessment Act*.”¹⁰ It does not state that the SACC will act as a framework for assessing the extent to which a project helps or hinders Canada’s ability to meet its climate commitments, which is appropriate because the SACC does not include such a framework.

Nothing in the SACC replaces Canada’s commitments under the Paris Agreement. Those commitments include taking ambitious efforts to limit global temperature rise to “well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels,”¹¹ pursuing mitigation measures to achieve Canada’s nationally-determined contribution,¹² and conserving and enhancing carbon sinks and reservoirs.¹³ The SACC is silent on these commitments, as well as on how to measure the extent to which a project will help or hinder Canada’s ability to meet them. It simply guides the scoping of climate-related information.

⁶ Tailored Impact Statement Guidelines Template for Designated Projects Subject to the *Impact Assessment Act*, online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/tailored-impact-statement-guidelines-projects-impact-assessment-act.html> at ss 14.3-14.4.

⁷ *Ibid* ss 15.1-15.4

⁸ E101589 - CTS 1999 No. 34, online: <https://www.treaty-accord.gc.ca/text-texte.aspx?id=101589>.

⁹ Online: <https://www.strategicassessmentclimatechange.ca/>.

¹⁰ EOCC Guidance, *supra* note 1, s 2.

¹¹ Arts 2.1(a), 3.

¹² Art 4.2

¹³ Art 5.1.

It would be unlawful to fail to assess the extent to which a project helps or hinders Canada's ability to meet its Paris Agreement commitments. As a policy respecting the scope of climate-related information that will be assessed, the SACC does not render Canada's Paris Agreement commitments irrelevant, nor does it act as a proxy for them. Indeed, the SACC states that during the impact assessment phase, the Agency (and presumably also review panels) "will provide supplemental analysis on the project's (net and upstream) GHG emissions in the context of Canada's emissions targets and forecasts, including Canada's commitments under the Paris Agreement, the goal for Canada to achieve net-zero emissions by 2050, Canada's 2030 emissions targets and Canada's Mid-Century Long-Term Low-Greenhouse Gas Development Strategy."¹⁴

It is appropriate that the Agency and review panels, rather than the proponent, be responsible for assessing the extent to which a project and alternatives help or hinder Canada's ability to meet its EOCC, including the extent to which the project and alternatives help or hinder Canada's ability to meet its Paris Agreement commitments. Additionally, the absence of the Paris Agreement from existing TISG in no way precludes the Agency or review panels from conducting that assessment. However, the presence of other environmental obligations makes the absence of the Paris Agreement notable and concerning, as it suggests an intention to abdicate Agency/review panel responsibility.

Additionally, to ensure the rigour of climate assessments, the public and Indigenous peoples must have an opportunity to feed information into the analysis. Burying mention of the Paris Agreement - and the other instruments that give rise to climate commitments - in the SACC without also recognizing them in the TISG or other planning phase outcomes seriously risks undermining the climate analysis and subsequent public interest determination. Failure to refer to such instruments and the requirements they contain is also arbitrary and inconsistent with the scheme of the IAA and in particular the analysis of environmental obligations, which proponents are tasked with doing in the TISG. The EOCC Guidance and Agency practice should not distinguish between environmental obligations and climate commitments in its approach to the analysis. Rather, to promote consistency, transparency and rigour, it must include climate commitments in the TISG.

Clarify that relevant EOCC may be identified in the impact assessment phase

Recommendation 6: Amend the EOCC Guidance to clarify that relevant EOCC may be identified during the impact assessment phase, not only during the planning phase.

As noted above, because the planning phase occurs before the impact statement and assessment phases, in some cases there will not be sufficient time or adequate evidentiary basis to guarantee that all relevant EOCC have been identified. While it is important to identify potentially relevant EOCC during the planning phase and include those in the TISG, the planning phase is too brief to ensure it will happen. Information may also arise during the impact statement and assessment phases indicating that additional EOCC are relevant. In other words, while the planning phase begins the scoping process, scoping must remain flexible and occur throughout the assessment as analyses and project redesign

¹⁴ *Supra* note 7 at 17.

occur. The EOCC Guidance should reflect this reality and clarify that while the Agency will seek to identify potentially relevant EOCC during the planning phase, relevant EOCC may be identified throughout the assessment.

Addressing alternatives assessment

Recommendation 7: Include a principle that alternatives assessment is fundamental to impact assessment, and therefore the EOCC analysis will occur through the comparative assessment of the extent to which each alternative would help or hinder Canada's ability to meet its EOCCs.

Recommendation 8: Amend Table 1 and sections 2 and 3 to reflect that the proponent, Agency and review panels are to comparatively assess the extent to which the alternatives help or hinder Canada's ability to meet its EOCCs.

Alternatives assessment “is at the heart of good environmental planning.”¹⁵ To achieve the objectives of the IAA, assessments should entail the comparative assessment of alternatives, including the no-project alternative, and the selection of the preferred alternative.¹⁶ This comparative assessment should include the assessment and comparison of the extent to which each alternative will help or hinder Canada's ability to meet its EOCC (among other things).

The template TISG partially reflects this intention: section 4.4 states that the impact assessment must identify “the methodology and criteria used to determine the preferred alternative means and the unacceptability of excluded alternative means, including consideration of trade-offs associated with the preferred and alternative means.”¹⁷ We note that the same should be required of the alternatives assessment. The TISGs of the Gazoduq Project go one step further, recognizing that “[t]he application of GBA+ to the analysis of alternative means of carrying out the project is necessary to inform how effects may vary for various subgroups (e.g. by gender, age, ethnicity, socio-economic status, health status, etc.).”¹⁸

While these requirements fall short of a comparative assessment and do not apply to the assessment of alternatives to the project, they do indicate an awareness that the alternative means assessment must be transparent and rigorous. To achieve those goals, both the alternatives to and alternative means assessments must entail comparative assessments of the section 22 factors, including the EOCC factor. Comparing the extent to which each alternative would help or hinder Canada's ability to meet its EOCC is also a necessary aspect of a fully informed public interest determination.

¹⁵ William A. Tilleman, “Environmental Assessment” in *Environmental Law and Policy*, 3rd edition, Elaine Hughes, Alastair R. Lucas and William A. Tilleman eds (Toronto; Emond Montgomery Publications Limited, 2003) 215 at 243.

¹⁶ A.J. Sinclair, M. Doelle & R. B. Gibson, “Implementing next generation assessment: A case example of a global challenge” (2018) 72 EIA Rev 166 at 168; Rod Northey, “Fading Role of Alternatives in Federal Environmental Assessment” (2016) 29 J Envtl L & Prac 41 at 54; and Nathalie J Chalifour, Drawing Lines in the Sand: Parliament's Jurisdiction to Consider Upstream and Downstream Greenhouse Gas (GHG) Emissions in Interprovincial Pipeline Project Reviews” (2018) 23 Rev Const Stud 129 at 146.

¹⁷ *Supra* note 4 at s 4.4.

¹⁸ *Supra* note 2 at s 3.4.

As a result, we recommend that the EOCC guidance be amended so that rather than restricting the EOCC assessment to only the project as proposed, it requires proponents to comparatively assess the extent to which each alternative to and alternative means would help or hinder Canada's ability to meet its EOCC when preparing the impact statement, and to similarly require Agency, review panels and federal expert departments to do the same during the impact assessment phase.

Clarify scope of indicators

Recommendation 9: Clarify in the EOCC Guidelines that EOCC indicators and mechanisms may include non-federal ones.

Currently, the EOCC Guidelines state that the analysis may consider “indicators or mechanisms that can be used to measure the extent of effects,”¹⁹ but do not specify whether those indicators or mechanisms only include federal ones, or may include non-federal indicators and mechanisms. Non-federal indicators can be useful and relevant, and proponents and authorities should be encouraged to look for such indicators and mechanisms for the assessment. For example, indicators for the Global Biodiversity Framework under the Convention on Biological Diversity currently in development may be relevant to many assessments.²⁰ Similarly, once in force Nova Scotia's *Sustainable Development Goals Act*²¹ sets out targets and goals that, while not binding on the federal government, could provide a useful framework for EOCC assessments.

EOCC include obligations and commitments arising under domestic non-statutory instruments

Recommendation 10: Broaden the definition of environmental obligations to include any EOCC arising under domestic instruments, including those not set out in legislation or regulations, such as

¹⁹ *Supra* note 1 at s 3 (“Analysis”).

²⁰ Online, <https://www.cbd.int/sbstta/sbstta-24/post2020-indicators-en.pdf>.

²¹ SNS 2019, c 26.

obligations arising under federal-provincial or federal-Indigenous agreements and obligations owed to Indigenous peoples.

Currently, the EOCC Guidance defines environmental obligations as “obligations applicable to the Government of Canada in domestic and international law in relation to the protection of the natural "environment”²² (note the misplaced quotation mark in front of “environment,” which occurs in the text). The IAA does not define the term environmental obligations, or the word obligation. As a result, it does not limit the term to only those obligations arising under domestic legislation and international law. We recommend that the Agency explore whether there are obligations arising under domestic instruments, such as federal-provincial agreements (e.g., CCME federal-provincial agreements such as the Canada-wide Air Quality Management System), as well as obligations owed to Indigenous peoples under treaties, land claims agreements, Canada’s fiduciary duty or other mechanisms, legislation or common law rules.

Gaps and Broader Needs

List of relevant environmental obligations and climate commitments

Recommendation 11: Develop a list of all environmental and climate instruments to which Canada is a party and that give rise to potentially relevant EOCC, and under each list each potentially relevant EOCC described within it.

Recommendation 12: Develop a shortlist of those EOCCs most likely to be relevant most often in IA.

Related to recommendation 1, it would be extremely useful for proponents, the public, Indigenous peoples and other authorities for the Agency to develop a list of all EOCCs that may be relevant to IA, and the instruments under which they arise. Having a ready list of potential EOCC would greatly assist the public with proactively identifying potentially relevant EOCC and commenting on the EOCC listed in the draft TISG.

As a starting place, the EOCC Guidance could link to the ECCC master list of international environmental instruments to which Canada is a party.²³ However, that list includes instruments that do not give rise to environmental obligations, meaning that the Agency (with the help of expert federal departments) should compile a separate list of those instruments that do give rise to environmental obligations relevant to IA. Also, that list does not describe the EOCC that arise under the instruments, which an Agency-specific document must do.

Additionally, because the list of all potentially relevant EOCC may be long, we recommend compiling a shorter list of those EOCC most likely to be relevant in the most IAs, such as the specific relevant

²² *Supra* note 1, s 2.

²³ Online: <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/participation-international-environmental-agreements.html>.

commitments arising under the Paris Agreement, certain obligations arising under the Convention on Biological Diversity, and certain obligations arising under the Convention for the Protection of Migratory Birds. Such a shortlist would be helpful in quick identification of most likely relevant EOCC, while a longer list would help ensure more obscure EOCC or EOCC only relevant to certain situations are not overlooked.

Strategic assessment of assessing the extent to which a project will help or hinder Canada’s ability to meet its biodiversity obligations

Recommendation 13: Establish a committee under section 95 of the IAA to conduct a strategic assessment respecting how the Agency and review panels are to determine the extent to which a project and its alternatives will help or hinder Canada’s ability to meet its biodiversity obligations.

Little is known about how to assess the extent to which a project and its alternatives will help or hinder Canada’s ability to meet its biodiversity obligations - or its other EOCC. Also, there is little collective experience in Canada of conducting rigorous public strategic assessments. We therefore recommend that the Minister establish a committee to conduct a strategic assessment of biodiversity, with the goal of identifying a framework for assessing the extent to which a project and alternatives would help or hinder Canada’s ability to meet its biodiversity obligations. The assessment should do more than the SACC did for climate, and identify not only information requirements, but also tools such as principles or criteria to guide the assessment of “the extent to which.”

For example, a strategic assessment of biodiversity could identify key biodiversity-related obligations, and factors or criteria for determining when those obligations may be relevant in project IA. It should also identify key indicators, or at least indicator sources, as well as principles to guide the assessment and tools for dealing with trade-offs. For example, how is the Agency to assess the extent to which alternatives “[p]romote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings”²⁴ if one alternative would protect one ecosystem while destroying a viable species population, another alternative would result in contrasting effects, and the only alternative that would not hinder Canada’s ability to meet its biodiversity obligations is the no-project alternative?

The strategic assessment should be conducted by a committee of independent experts with the Agency chairing its secretariat, and be given broad, enabling terms of reference that task it with initial issues-identification and scoping. It should have the mandate and expertise to commission expert evidence and be required to meaningfully and proactively engage the public. As the Agency is currently doing with the Regional Assessment in the Ring of Fire, it should conduct widespread early engagement on the assessment’s terms of reference. We intend to make further recommendations on a strategic assessment of biodiversity in the upcoming months.

²⁴ Convention on Biological Diversity, Article 8(d), online: <https://www.cbd.int/convention/articles/?a=cbd-08>.

Analytical framework(s) for assessing the extent to which a project will help or hinder Canada's ability to meet its other EOCC

Recommendation 14: Explore indicators and principles or criteria for assessing the extent to which projects and alternatives help or hinder Canada's ability to meet its various EOCC.

Ultimately, a policy - or policies - are needed setting out how the Agency or review panels are to comparatively assess the extent to which each project alternative and alternative means will help or hinder Canada's ability to meet its EOCC. Once the Agency has compiled the list of potentially relevant EOCC as recommended above, the next step should be to explore indicators, mechanisms and/or frameworks for making the determination described in sections 22(1)(i) and to aid the consideration of section 63(e).

Such an approach is consistent with that taken under CEAA 2012, and specifically the Agency's policy "Determining Whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under CEAA 2012," which contains a framework and criteria for assessing the significance of environmental effects.²⁵ A similar framework that includes indicators and criteria for determining the extent to which the project and its alternatives help or hinder Canada's ability to meet its EOCC would provide upfront clarity to the proponent, participants, Indigenous peoples and authorities, and lead to greater consistency and credibility of analyses.

The policy should also include criteria or principles dealing with when different indicators yield conflicting results, or when different alternatives may result in conflicting or competing results. For example, an option for a fly-in operation may hinder Canada's ability to meet its climate commitments more than a road alternative, whereas the road alternative may also hinder the ability to meet our biodiversity obligations. Also, when is a project's hindrance too great? To what extent should assessments require efforts to help Canada achieve its EOCC? Agency policy should provide a framework for answering these and other important questions about the interaction of effects, promoting benefits and dealing with various trade-offs. The development of such a policy may benefit from a strategic assessment upon the successful completion of a biodiversity assessment in order to benefit from lessons learned.

²⁵ Online, https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/determining-whether-designated-project-is-likely-cause-significant-adverse-environmental-effects-under-ceaa-2012.html#_Toc005.