

**Strategic Assessment of Thermal Coal Mining**

Environment and Climate Change Canada  
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**Recommendations on Terms of Reference for Strategic Assessment of Thermal Coal Mining**

Dear Sirs/Mesdames,

Please accept the following submissions on the terms of reference (TOR)<sup>1</sup> for the proposed strategic assessment of thermal coal (SATC). West Coast Environmental Law is dedicated to safeguarding the environment through law. Since 1974 our staff lawyers have successfully worked with communities, non-governmental organizations, the private sector and all levels of governments, including First Nations governments, to develop proactive legal solutions to protect and sustain the environment. We have represented clients in relation to such recent environmental assessments (EA) as the proposed Site C Clean Energy project, Enbridge Northern Gateway pipelines and tankers project, and Trans Mountain pipelines and tankers project. For many years we had a seat at the Regulatory Advisory Committee on federal EA and held a seat at the Multi-Interest Advisory Committee (MIAC) appointed in 2016 to advise first the expert panel and later the Minister of Environment and Climate Change on the review of federal EA processes. Additionally, as a West Coast staff lawyer, I currently co-chair the Environmental Planning and Assessment Caucus of the Canadian Environmental Network.

A goal of our recommendations is the design of a strategic assessment that results in direction on thermal coal mining and export that helps Canada to advance sustainability, take aggressive climate action and uphold Indigenous peoples' rights and authority. But importantly, we also make our recommendations in the hopes of securing a stronger precedent for future strategic assessments under the *Impact Assessment Act* (IAA).<sup>2</sup> The IAA is now one year old, and the SATC is the second strategic assessment undertaken since the IAA came into force. The first, the Strategic Assessment of Climate Change (SACC), did not align with best practices. The SATC provides an opportunity to change course and identify a strategic assessment process that is iterative and deliberative, meaningfully engages the public, is based on sound science and Indigenous knowledge, considers alternatives and identifies

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<sup>1</sup> Government of Canada, "Draft terms of reference for conducting a strategic assessment of thermal coal mining" (30 July 2020), online: <https://www.canada.ca/en/environment-climate-change/corporate/transparency/consultations/draft-terms-reference-conducting-strategic-assessment-thermal-coal-mining.html> [SATC Draft TOR].

<sup>2</sup> SC 2019, c 28, s 1.

preferred pathways, and results in credible direction for project-level decision making. These recommendations are designed to produce such a process.

### What is Strategic Assessment?

Many conceptualizations of strategic assessment exist:<sup>3</sup> Strategic assessment may assess new or existing policies, plans and programs, such as those contemplated by the Cabinet Directive on Strategic Environmental Assessment of Policy, Plan and Program Proposals,<sup>4</sup> or take the form of “proactive” assessments that occur in order to fill policy gaps (such as federal policy respecting the export of thermal coal and its implications on Canadian commitments under the Powering Past Coal Alliance).<sup>5</sup> Strategic assessment may also focus on a collection of project and activity types (such as thermal coal mining in Canada or a region within Canada).<sup>6</sup>

There is no cookie-cutter process for conducting strategic assessments: rather, processes should be tailored to the particular circumstances. However, some standard features are present in best-practice strategic assessment, many of which apply also to project-level impact assessment (IA). These include:

- **An undertaking:** In project IA, the subject of the assessment is a proposed undertaking (e.g., a coal mine). Similarly, the strategic assessment should identify the undertaking that is the subject of the assessment (e.g., federal policy respecting thermal coal export, or an analytical framework for assessing thermal coal mines in Canada).
- **A proponent:** As with a project IA project description, the TOR should specify the proponent of the policy, plan, program or other undertaking that is the subject of the assessment (e.g., the government body responsible for the resulting policy).
- **Application early in the undertaking’s development:** Like project IA, strategic assessment is most effective when applied as early as possible.
- **Alternatives assessment:** Fundamental to the exercise of impact assessment is the identification and evaluation of alternatives, and selection or identification of the preferred alternative. Strategic assessment is no different. Depending on how the undertaking (or undertakings) is defined, alternatives may include alternative policies, plans or programs respecting thermal coal, different analytical frameworks for assessing thermal coal mining, or different development scenarios for thermal coal mining in Canada or a region. The impacts of each alternative should be assessed and made public.
- **Clearly identified objectives and assessment criteria or principles:** For assessments to be rigorous and credible, they should identify and make transparent the desired environmental and socio-economic outcomes of the undertaking, and criteria or principles that will form the analysis, comparison of alternatives, and identification of the preferred alternative. For

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<sup>3</sup> Bram Noble & Kelechi Nwanekezie, “Conceptualizing strategic environmental assessment: Principles, approaches and research directions” (2017) 62 EIA Rev 165 at 165.

<sup>4</sup> Government of Canada, “The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals,” online: <https://www.canada.ca/en/impact-assessment-agency/programs/strategic-environmental-assessment/cabinet-directive-environmental-assessment-policy-plan-program-proposals.html>.

<sup>5</sup> 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 170.

<sup>6</sup> A. John Sinclair, Meinhard Doelle & Peter N. Duinker, “Looking up, down, and sideways: Reconceiving cumulative effects assessment as a mindset” (2017) 62 EIAR 183 at 184, 191.

example, objectives may include: rapid decarbonisation and Canada’s ability to meet its mid- and long-term climate targets; lasting, quality jobs for local communities; increased tax revenues; water quality; social civility and community cohesion; and respect for Indigenous rights, upholding Indigenous authority and advancement of reconciliation. Once these objectives are identified, the assessment authority should identify the criteria or principles for evaluating and comparing each alternative’s effects on the objectives.

- **Assessment by an independent body:** To be objective and credible, the assessment authority should be different from the proponent. In project IA, proponents write impact statements but the Impact Assessment Agency of Canada (Agency) or review panels conduct the overall assessment. Similarly, the strategic assessment authority should be independent of the body responsible for the undertaking.
- **Collaboration with Indigenous peoples:** As with project IA, strategic assessments should be co-designed and co-conducted with Indigenous governments and organizations, and ensure that the assessment and outcomes uphold Indigenous rights and authority.
- **Meaningful public participation:** Strategic assessments should recognize and respect the interests and expertise of communities and individuals, expert and non-expert. Meaningful public participation begins early and takes the form of an iterative dialogue throughout the assessment. More than a check-box exercise, meaningful public participation means facilitating two-way dialogue, showing participants when and how their input is considered, and justifying departures from public comments.

Our recommendations below draw on these features in an effort to propose a process that will align with best practices, maximize environmental and community gains, and be publicly accepted.

## Recommendations

### *Section 1: Context*

**Recommendation 1: That the SATC be conducted pursuant to section 5 of the *Department of the Environment Act* in addition to section 95 of the *Impact Assessment Act*, in order to broaden the scope of assessment of means of achieving Canada’s goals and commitments in the Powering Past Coal Alliance.**

Section 95 of the IAA limits the Minister of Environment and Climate Change to ordering strategic assessments to only those policies, plans, programs or issues that are “relevant to conducting impact assessments.” However, the draft TOR states that the assessment “will consider the implications of thermal coal mining and export on Canada’s related domestic and international policies, commitments and objectives, including the Powering Past Coal Alliance.”<sup>7</sup> We support this language, but if the SATC is conducted solely under section 95 of the IAA then it would be limited to considering the implications of the export of thermal coal that is mined by projects that are assessed under the IAA.

Rather, we recommend that the SATC assess *all* thermal coal export through Canadian ports, whether the coal is mined in Canada or elsewhere. The Powering Past Coal Alliance commits members “to supporting clean power generation through their policies.”<sup>8</sup> The SATC should assess the export of

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<sup>7</sup> SATC Draft TOR, *supra* note 1, s 3.

<sup>8</sup> Powering Past Coal Alliance, *PPCA Declaration* (16 November 2017), online: <https://poweringpastcoal.org/about/declaration>.

thermal coal against this commitment and identify a preferred export scenario in light of the Powering Past Coal Alliance. Conducting the strategic assessment under section 5(a)(ii) of the *Department of the Environment Act*<sup>9</sup> would enable this scope.

### *Section 2: Objectives*

**Recommendation 2: That the word “new” be deleted from the existing objective of the SATC, and that the objective include identification of a framework for determining whether a proposed thermal coal mine is consistent with Canada’s international obligations and commitments: “The strategic assessment of thermal coal mining will guide decision-makers on how ~~new~~ thermal coal mine projects will be considered under the *Impact Assessment Act*. It will provide a framework for the Impact Assessment Agency of Canada and review panels to use when determining the extent to which a proposed thermal coal mine is consistent with Canada’s international obligations and commitments.”**

While the definition of “designated project” in the IAA includes expansions, it would be possible to interpret the current language of section 2 of the draft TOR as limiting the scope of the SATC to only new mines. We recommend deleting the word “new” to clarify that the SATC will assess the implications of both new thermal coal mines and expansions that are designated projects under the IAA.

It is also important that the SATC go beyond identifying the information that will be required of thermal coal mine proponents in an IA. The SACC has been criticized for failing to specify how assessment authorities should arrive at conclusions respecting a project’s contributions to Canada’s climate targets.<sup>10</sup> Rather than missing another opportunity, the SATC should seek to identify an analytical framework to guide project IA authorities’ conclusions and recommendations respecting the impact of thermal coal mining on Canada’s ability to meet its international commitments and obligations, and in turn to guide decision makers when considering the same. This analytical framework should be identified as one undertaking that is subject to the strategic assessment.

**Recommendation 3: That the TOR be amended to include a second objective: To guide the development of a policy or plan respecting the export of thermal coal through Canadian ports that will help Canada advance its international goals and commitments, including under the Powering Past Coal Alliance.**

As noted above, we recommend that the SATC assess all thermal coal export through Canadian ports, not just thermal coal that is mined in Canada. Limiting the assessment to the export of Canadian thermal coal would risk creating an arbitrary and unfair disadvantage to Canadian projects, and would omit the

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<sup>9</sup> RSC 1985, c E-10.

<sup>10</sup> See, e.g., West Coast Environmental Law, “Updates to Strategic Assessment of Climate Change welcome, but huge gaps remain” (16 July 2020), online: <https://www.wcel.org/media-release/updates-strategic-assessment-climate-change-welcome-huge-gaps-remain>; Vancouver Sun, “Major new pipelines and mines must show path to ‘net zero’ to get approved” (16 July 2020), online: <https://www.vancourier.com/major-new-pipelines-and-mines-must-show-path-to-net-zero-to-get-approved-1.24171653>; Pembina Institute, “Guidelines to assess climate impacts of major projects fall short” (16 July 2020), online: <https://www.pembina.org/media-release/guidelines-assess-climate-impacts-major-projects-fall-short>; David V. Wright, “Final Strategic Assessment on Climate Change: Zero Net Effect?” *ABlawg* (10 August 2020), online: <https://ablawg.ca/2020/08/10/final-strategic-assessment-on-climate-change-zero-net-effect/>.

vast majority of thermal coal exports through Canadian ports.<sup>11</sup> Rather, the SATC should seek to identify policy direction or a plan respecting the export of all thermal coal through Canadian ports, not just thermal coal originating in Canada. This future policy or plan would be a second undertaking that is subject to the assessment.

**Recommendation 4: The TOR should identify the proponent of the undertakings.**

As noted above, undertakings should have proponents – the entity or person responsible for the desired outcome of the assessment. In this case, that body would be the body or bodies responsible for producing the analytical framework for assessing thermal coal’s contributions of Canada’s ability to meet its environmental and climate change obligations, as well as for the policy or plan respecting thermal coal export through Canadian ports. The proponent may be a minister (e.g., Minister of Environment and Climate Change), department or agency (e.g., Environment and Climate Change Canada), Governor in Council, or other. Identification of the proponent(s) lends credibility and clarity to the assessment, and is a necessary first step in ensuring that the assessment is conducted by an authority independent from the proponent.

*Section 3: Scope of the strategic assessment*

**Recommendation 5: That the first bullet of section 3 of the TOR be amended as follows: “The strategic assessment will include, but not be limited to, identification of alternative development scenarios of thermal coal mining and the end use associated with each scenario, including a no, moderate and high development scenario, and comparative evaluation of the environmental and health impacts of each of those scenarios. The scope of impacts should be broad, and include the factors listed under section 22(1) of the Impact Assessment Act.”**

**Recommendation 6: That the second bullet of section 3 be amended as follows: “Market analysis of projected demand for thermal coal. This will include an overview of Canada’s current and proposed thermal coal mines, an assessment of the economic importance of the thermal coal mining sector in Canada, and projections of future domestic and global demand for thermal coal mined in Canada, including under a scenario in which projected demand is consistent with global decarbonization and the successful implementation of the Paris Agreement.”**

**Recommendation 7: That the third bullet of section 3 be amended as follows: “The identification of alternative policies or plans respecting thermal coal export, and the comparative evaluation of the environmental consequences and implications of each for achieving Canada’s international goals and commitments, including under the Powering Past Coal Alliance.”**

Alternatives assessment is fundamental to the practice of impact assessment, whether it be project IA, regional IA or strategic IA. Each of the factors listed in the scope of the assessment should include the identification, assessment, and comparison of alternatives, in order to identify the desired policy direction according to specified criteria (see Recommendation 8).

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<sup>11</sup> Port of Vancouver, “2019 Statistics Overview” (2019), online: <https://www.portvancouver.com/wp-content/uploads/2020/03/Statistics-overview-2017-to-2019.pdf> at 11; Prince Rupert Port Authority, “Monthly Traffic Summary – For July 2020,” online: [https://www.rupertport.com/wp-content/uploads/cargoPDF/2020\\_July.pdf](https://www.rupertport.com/wp-content/uploads/cargoPDF/2020_July.pdf).

**Recommendation 8: That section 3 of the TOR include the identification of criteria and trade-off rules for evaluating alternatives and identifying preferred alternatives and scenarios.**

As Robert Gibson notes, all decision-making processes entail some set of considerations, values, goals, criteria or rules, whether they be explicit or implicit. For example, selecting fruit at a market might involve considering ripeness against place of origin and price, often requiring sacrifice in one area for gains in another. Impact assessment is fundamentally similar in that assessment authorities will arrive at recommendations or decisions by applying values or objectives when drawing conclusions.<sup>12</sup> For example, the SATC will result in outcomes – be they a framework for determining a thermal coal mine’s contributions to Canada’s ability to achieve its climate targets, a policy respecting thermal coal exports, or other – by comparing alternative approaches against desired outcomes, such as global greenhouse gas reductions. Essential for the credibility of the assessment is whether the public agrees with the criteria used to evaluate options, and how transparently they have been applied in the assessment.

For example, if the SATC evaluates thermal coal mining’s impacts on Canada’s ability to meet its environmental obligations as well as its socio-economic effects, then resulting policy direction may necessitate weighing adverse environmental impacts against socio-economic benefits. It will require methodology for determining what is an impact, benefit, risk or uncertainty, as well as how to evaluate impacts against each other. For example, is a temporary, low-wage job an economic benefit? What about a well-paying long-term job for one community that comes at the expense of a person’s livelihood elsewhere? How should assessment authorities weigh environmental impacts against socio-economic benefits?

To be credible and rigorous, the SATC should identify the criteria or principles that will be applied to the assessment of the various alternatives. These criteria should be identified pursuant to public engagement and Indigenous consultation and collaboration, and be made publicly available at the early stages of the assessment so that they can inform decisions and engagement.

**Recommendation 9: That section 3 include a requirement to assess impacts of thermal coal mining and export on Indigenous rights, laws and authority.**

In addition to environmental, socio-economic and health impacts, the TOR should require that the SATC assess impacts of the identified alternatives on Indigenous peoples’ rights and authority.

*Section 4: Approach*

**Recommendation 10: That section 4 of the TOR be revised to commit to appointing an independent expert committee (the Committee), including Indigenous membership and with expertise in meaningful public engagement, with secretariat support from the Impact Assessment Agency of Canada.**

The TOR appears to assume that an interdepartmental task team comprised of federal officials may be considered a committee under section 95 of the IAA. The SATC is the first strategic assessment to be officially conducted under the IAA, and it is important that the process create a strong precedent for future assessments. The SACC process was criticized for its lack of meaningful engagement and for opaque decision-making; a committee of independent experts, including with expertise in engagement

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<sup>12</sup> Robert B. Gibson, *Sustainability Assessment: Applications and Opportunities* (Oxon: Routledge, 2017) at 1.

and process design, will help ensure that the SATC is rigorous and credible while also exploring processes that may be effective in future strategic assessments.

Additionally, it appears likely that some of the departments stated in the TOR to be on the task team will be proponents of the SACC: e.g., Environment and Climate Change Canada may provide direction to the Impact Assessment Agency of Canada on information and analysis to be applied when assessing thermal coal mines, while Natural Resources Canada and Global Affairs Canada may be proponents of policy direction on the future of thermal coal mining exports from Canadian ports. A committee of experts not in the employ of the federal government would create necessary independence between the proponents of the plans, policies or programs that are the subject of the SATC and the assessment authority.

**Recommendation 11: That the TOR authorize the Committee to commission expert reports, and provide the Committee with a budget to do so.**

It is possible that issues raised in the SATC will require expert advice beyond the ability of federal departments or Committee members to provide. Therefore, the Committee should be empowered to commission expert reports to publicly inform deliberations.

**Recommendation 12: That section 4 require the Committee to produce a discussion paper describing key issues and proposing a framework for the assessment, including scope, studies, alternatives, values and criteria, and means of public and Indigenous engagement.**

The IAA establishes a pre-assessment planning phase to enable the Agency to engage the public and Indigenous peoples on the scope and process of project IA. The planning phase is intended to help identify key issues, studies needed, how the public and Indigenous peoples wish to be consulted, information needed by the proponent and other experts, and other key matters. In short, it is intended to tailor IA processes to the specific circumstances and needs at hand.

The strategic assessment should similarly have an initial planning phase, in which the Committee should engage the public, Indigenous peoples, federal departments and experts on key issues, process design questions, principles (or criteria) for the assessment and desired outcomes. The TOR should require the Committee to publish a discussion paper (or discussion papers) outlining a proposed approach and engage the public on the discussion paper before producing a final framework for the assessment.

**Recommendation 13: That the first bullet in section 4 be amended as follows: “Meaningfully engage the public and key stakeholders, in accordance with section 5.”**

The IAA requires public participation to be meaningful. The draft TOR fall short of this mark. As discussed below, public engagement should adhere to the principles of meaningful public engagement outlined in the MIAC submissions to the Expert Panel appointed in 2016 to review Canada’s environmental assessment processes.<sup>13</sup>

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<sup>13</sup> Multi-Interest Advisory Committee, “Advice to the Expert Panel Reviewing Environmental Assessment Processes” (December 2016) at 41-47 [MIAC].

### *Section 5: Engagement*

**Recommendation 14: That section 5 be replaced with a requirement for the Committee to meaningfully engage the public and Indigenous peoples, and collaborate with Indigenous authorities.**

**Section 5 should also prescribe minimum requirements of engagement, including:**

- **Early engagement with the public and Indigenous peoples on how they wish to be engaged;**
- **Publication of draft engagement plans, with a comment period on those plans;**
- **Ongoing engagement that includes both comment periods and in-person, facilitated dialogue sessions;**
- **Appointment of a working group of experts, environmental groups, Indigenous peoples and industry;**
- **Participant and Indigenous funding; and**
- **Requirement to indicate in each step how public and stakeholder comments have been addressed, and justification for departure from those recommendations.**

The MIAC final report to the Expert EA Panel outlined the key principles of meaningful public engagement. They are:<sup>14</sup>

- Participation begins early in the decision process, is meaningful, and builds public confidence;
- Public input can influence or change the outcome/project being considered;
- Opportunities for public comment are open to all interested parties, are varied, flexible, include openings for face to face discussions and involve the public in the actual design of an appropriate participation program;
- Formal processes of engagement, such as hearings and various fora of dispute resolution, are specified and principles of natural justice and procedural fairness are considered in formal processes;
- Adequate and appropriate notice is provided;
- Ready access to the information and the decisions at hand is available and in local languages spoken, read and understood in the area;
- Participant assistance and capacity building is available for informed dialogue and discussion;
- Participation programs are learning oriented to ensure outcomes for all participants, governments, and proponents;
- Programs recognize the knowledge and acumen of the public; and
- Processes need to be fair and open in order for the public to be able to accept a decision.

The MIAC advice also sets out principles of engagement with Indigenous peoples.<sup>15</sup> The TOR should acknowledge and reflect these principles, and set the stage for engagement that upholds them. A purpose of the IAA is “to ensure that opportunities are provided for meaningful public participation during an impact assessment, a regional assessment or a strategic assessment.”<sup>16</sup> Other purposes

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<sup>14</sup> *Ibid* at 41-42.

<sup>15</sup> *Ibid* at 8-18.

<sup>16</sup> IAA, s 6(1)(h).



include respect for Indigenous rights and promotion of cooperation with Indigenous peoples.<sup>17</sup> As currently drafted, the TOR do not reflect these purposes. To be credible and encourage buy-in to the SATC outcomes, the TOR must set the stage for meaningful engagement, cooperation with Indigenous peoples, and upholding of Indigenous rights and authority.

## Conclusion

The SATC marks an important opportunity to provide direction on thermal coal mining and export in Canada, and give effect to Canada's commitment to do our fair share towards limiting global warming to 1.5°C. As the first strategic assessment triggered under the IAA, it is also an opportunity to design a strategic assessment process that aligns with best practices. In order to achieve credible and effective results, the TOR must establish a process that is rigorous, participative and independent, and that respects Indigenous rights and authority. We believe implementing our recommendations will help achieve those goals.



Anna Johnston  
Staff Counsel, West Coast Environmental Law Association

## Summary of Recommendations

**Recommendation 1:** That the SATC be conducted pursuant to section 5 of the *Department of the Environment Act* in addition to section 95 of the *Impact Assessment Act*, in order to broaden the scope of assessment of means of achieving Canada's goals and commitments in the Powering Past Coal Alliance.

**Recommendation 2:** That the word "new" be deleted from the existing objective of the SATC, and that the objective include identification of a framework for determining whether a proposed thermal coal mine is consistent with Canada's international obligations and commitments: "The strategic assessment of thermal coal mining will guide decision-makers on how ~~new~~ thermal coal mine projects will be considered under the *Impact Assessment Act*. It will provide a framework for the Impact Assessment Agency of Canada and review panels to use when determining the extent to which a proposed thermal coal mine is consistent with Canada's international obligations and commitments."

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<sup>17</sup> IAA, s 6(1)(f)-(g).

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Recommendation 13: That the first bullet in section 4 be amended as follows: “Meaningfully engage the public and key stakeholders, in accordance with section 5.”

Recommendation 14: That section 5 be replaced with a requirement for the Committee to meaningfully engage the public and Indigenous peoples, and collaborate with Indigenous authorities. Section 5 should also prescribe minimum requirements of engagement, including:

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- Ongoing engagement that includes both comment periods and in-person, facilitated dialogue sessions;
- Appointment of a working group of experts, environmental groups, Indigenous peoples and industry;
- Participant and Indigenous funding; and

- **Requirement to indicate in each step how public and stakeholder comments have been addressed, and justification for departure from those recommendations**