



environmental
defence



October 16, 2020

Sent via email: ec.ministre-minister.ec@canada.ca

The Honourable Jonathan Wilkinson, PC, MP
Minister of Environment and Climate Change
200 Sacré-Coeur Boulevard
Gatineau QC K1A 0H3

Dear Minister Wilkinson,

Re: Terms of Reference for Strategic Assessment of Thermal Coal

We write to highlight two concerns requiring immediate attention arising from the draft Terms of Reference (TOR) for the Strategic Assessment of Thermal Coal (SATC). We urge you to consider our recommendations for addressing the SATC's limited objective and scope and its procedural deficiencies.

Scope and objectives of the SATC

The July 30, 2020 edition of *The Globe and Mail* quotes you as saying, "Canadians expect us to look at whether or not we should continue to be exporting thermal coal at a time when we're telling other governments that they shouldn't be using it."¹

We are encouraged by this statement and the policy direction it suggests for Canada. At a time when the world is facing a climate emergency and thermal coal is recognized as the single largest contributor to global temperature rise, the SATC presents an opportunity to address growing concerns about the impacts of Canadian thermal coal mining and export. Indeed, concerns relating to continued production of thermal coal for export partly explain why nearly 32,000 Canadians wrote to ask that you require an impact assessment for the Vista Coal Mine expansion, and why organizations like ours applauded your decision on that proposed project.

However, the draft TOR appear to limit the SATC to "guide decision-makers on how new thermal coal mine projects will be considered under the *Impact Assessment Act*" (IAA), and ignore other important aspects and federal regulation of thermal coal mining, transport, use and export.

¹ Emma Graney, [Ottawa orders federal review of Alberta coal mine expansion](#) (30 July 2020), *The Globe and Mail*.

The TOR should set out comprehensive objectives that would ensure the SATC strategically considers and informs decision making on how thermal coal is mined and exported now and in the future. In particular, it should:

- Consider the 17-20MT/year² currently exported through Canadian ports, including the significant amount of U.S. thermal coal, and seek to inform federal policy respecting such exports;
- Consider future increases to thermal coal exports from existing Canadian mines, including increases that may result from domestic producers shifting towards production for export through existing export capacity, and identify preferred policy direction for such potential exports;
- Consider any expansions to coal export facilities, and seek to guide impact assessments of those expansions; and
- Capture new thermal coal mines that fall below the prescribed daily production thresholds in the *Physical Activities Regulations*, as well as expansions to existing mines that fall below the regulatory threshold.

Broadening the SATC's objectives is essential for ensuring that all relevant considerations relating to thermal coal are surveyed, and can form an effective basis for federal policy-making. Practically speaking, we believe that the identified deficiency in the SATC's objectives can be addressed by:

- Expanding the section 2 Objectives of the TOR to allow the SATC to inform and guide federal policies, plans and programs in relation to thermal coal, and to apply to any new or expanded thermal coal export facilities;
- Referring to the *Department of the Environment Act* to explicitly incorporate your authority under that Act in expanding the SATC's mandate beyond the potential limits of section 95 of the *IAA*.

A number of the signatories to this letter have also submitted comments as a part of the public comments process on the TOR that provide specific language suggestions incorporating the above and are attached as **Appendix A** to this letter.

Process issues

The Strategic Assessment of Climate Change (SACC) was the object of criticism for both its process and its outcomes. It is important that the SATC not repeat these shortcomings. It must

² 9 Port of Vancouver, "2019 Statistics Overview" (Port of Vancouver, 2019), online: (<https://www.portvancouver.com/wp-content/uploads/2020/03/Statistics-overview-2017-to-2019.pdf>) at 11; Godwin, Tyler "Alberta coal production falls to 12-year low in July" SPG Global (15 Sept 2020).

allow for meaningful public engagement and be conducted by an independent committee, or at the very least by the Agency.

Based on the draft TOR and communications with officials at ECCC, we do not believe the SATC will provide for meaningful public engagement. To be meaningful, engagement must begin early and occur throughout, and should go well beyond two stakeholder “engagement sessions,” to include in-person dialogues in relevant communities, formal presentations, and comment periods. The public must be able to see, in a timely manner, how their comments have been considered. We note that to date, public comments on the draft TOR have yet to be posted publicly. Participant funding must also be provided.

Additionally, we are deeply concerned over the prospect of the SATC being conducted by ECCC or an interdepartmental task team. During the SACC, ECCC demonstrated its lack of knowledge of and expertise with strategic assessment and public engagement, and we are concerned these shortcomings would also impact results of the SATC.

Given the potential scope of the SATC and the public’s demonstrated interest, we urge you to appoint an independent committee, or at a minimum place the Agency in charge of the assessment, to ensure achievement of the principles and purposes of the *IAA*. With the right expertise, an independent committee could meaningfully engage the public, Indigenous peoples and stakeholders while adhering to any timelines set for the assessment and ensuring that the SATC is concluded in time to inform the Vista Coal Mine expansion impact assessment.

Finally, the TOR should task the Committee (or the Agency) with conducting an initial scoping exercise to identify the key issues, intended outcomes, alternative approaches to those outcomes, and the values that will guide the assessment. An initial scoping or planning phase, followed by a preliminary discussion document, will help avoid repeating the experience of the SACC where decisions were made too late in the process to change course and avoid general dissatisfaction. As the first strategic assessment formally conducted under the *IAA*, it is critically important that every attempt be made to get the process right.

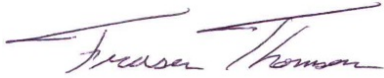
Attached as **Appendix B** to this letter is a submission to ECCC submitted as a part of the public comments process on the TOR that explains process issues in more detail.

Conclusion

We thank you for the opportunity to participate in the SATC. Done right, it can continue Canada’s strong domestic and international leadership and consistent action on transitioning away from thermal coal, while setting a precedent for successful future strategic assessments under the *IAA*. The SATC has the potential to build on Canada’s record and cement its approach as world-leading. In order to meet this potential, the SATC must be undertaken effectively and it must meet its stated goals.

We believe that addressing the above matters is essential to the effectiveness of the SATC. We request a meeting with you in the next two weeks to discuss how our recommendations can be addressed before the TOR are finalized.

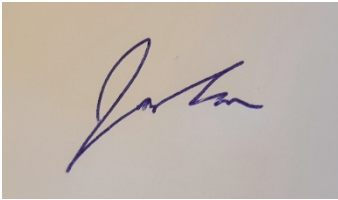
Sincerely,



Fraser Thomson
Staff Lawyer, Ecojustice
On behalf of Keepers of the Water, Keepers of the Athabasca and West Athabasca Bioregional
Society



Anna Johnston
Staff Lawyer, West Coast Environmental Law Association



Julia Levin
Climate and Energy Program Manager, Environmental Defence

August 28, 2020

Sent via E-mail: ec.esemct-satcm.ec@canada.ca

Strategic Assessment of Thermal Coal Mining
Environment and Climate Change Canada
351 St. Joseph Boulevard, 12th Floor
Gatineau, QC K1A 0H3

Dear Sir/Madam:

Re: Comments on Draft Terms of Reference for Conducting a Strategic Assessment of Thermal Coal Mining

I write on behalf of Keepers of the Water, Keepers of the Athabasca and West Athabasca Bioregional Society to provide comments on the draft terms of reference for the strategic assessment of thermal coal mining.

Keepers of the Water and Keepers of the Athabasca are comprised of First Nations, Metis, and Inuit peoples, environmental groups, concerned citizens and communities working together for the protection of air, water and land – and thus, for all living things today and tomorrow in the Arctic Drainage Basin and Athabasca River Basin respectively. The West Athabasca Bioregional Society is a group of concerned citizens from the communities of Edson, Jasper, Hinton, Brule and surrounding areas who work to protect, preserve and restore the Athabasca Watershed through advocacy, education and community projects.

Thank you for the opportunity to offer comments.

My clients are encouraged to see the Minister of Environment and Climate Change (“Minister”) is engaging in a strategic assessment of the important topic of thermal coal. As described throughout this letter, thermal coal causes serious lifecycle impacts to the environment, human health and Indigenous peoples and their rights. Indeed the climate impacts of thermal coal combustion have been a central focus of Government of Canada’s actions on climate change. This strategic assessment provides an opportunity to fully bridge Canada’s international leadership on this issue with its domestic actions and policy.

The following submissions provide comments and recommendations for amendment to the *Draft Terms of Reference for Conducting a Strategic Assessment of Thermal Coal Mining* in the following areas:

- Amending the “Objectives” in section 2 of the draft terms of reference;
- Amending the “Scope of the strategic assessment of thermal coal mining” in section 3 of the draft terms of reference;
- Revising the “Approach to conducting the strategic assessment of thermal coal mining” in section 4 of the draft terms of reference; and
- Additional comments relating to amending the “Context” in section 1 of the draft terms of reference to clarify the application of the results of the strategic assessment.

The Appendix provides a full list of recommendations.

1. Objectives

The draft version of the “Objectives” in section 2 of the draft terms of reference are as follows:

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.

My clients’ comments and recommendations are organized under the following headings.

a. “New” thermal coal mine projects

The use of the word “new” in the objectives statement could cause uncertainty regarding whether the strategic assessment applies to all thermal coal mine projects (including both new projects and expansions of existing mines) or whether it applies merely to new thermal coal mines (and not expansions of existing mines). The strategic assessment is clearly intended to apply to, at the very least, all designated thermal coal mine projects including new thermal coal mines captured under s. 18(a) of the Schedule to the *Physical Activities Regulations*¹ (“*Regulations*”), expansions to existing mines captured under s. 19(a) of the Schedule to the *Regulations* and any other thermal coal mine projects which may be designated by the Minister under s. 9(1) of the *Impact Assessment Act* (“*IAA*”). Indeed, an alternative interpretation that the strategic assessment applies only to new thermal coal mines would lead to absurd consequences, as it would imply that the strategic assessment will only consider a subset of designated thermal coal mine projects under the *IAA* that are not necessarily responsible for the most serious impacts. It is therefore desirable to avoid any possible confusion by clarifying the terms of reference to remove the term “new”.

Recommendation: In the objectives statement, the word “new” preceding “thermal coal mine projects” should be removed, or else the objectives statement should be otherwise clarified to confirm that the strategic assessment will apply to all thermal coal mine projects designated under the *Regulations* or s. 9(1) of the *IAA*.

¹ *Physical Activities Regulations*, SOR/2019-285.

b. Federal policy on thermal coal

The context section of the draft terms of reference states the following:

Canada is launching a strategic assessment under the Impact Assessment Act to solicit feedback on relevant policy considerations related to thermal coal mining and to consider the future of new thermal coal mine projects in Canada under federal review.

This statement suggests that the strategic assessment could inform not only federal policy relevant to conducting impact assessments of thermal coal mining projects, but also other federal policy on thermal coal mining.

The terms of reference should reflect this objective and should explicitly speak to the consideration of federal policy measures relating to thermal coal beyond those that are solely applicable to impact assessments. To this end the terms of reference should more clearly specify that this strategic assessment can consider policy measures that don't directly engage impact assessments. Specifically, the wording of the objective should be amended as set out below.

As well, the terms of reference should refer to the Minister's authority under both the *IAA* and the *Department of the Environment Act*.² Referring to the Minister's powers under the *Department of the Environment Act* would formalize the discretion of the committee to consider matters relating to thermal coal beyond solely impact assessments of designated projects. This would be consistent with the previous practice set out in the Terms of Reference of the Strategic Assessment of Climate Change which also referred to the Minister's powers under the *Department of the Environment Act*.³

Although the Strategic Assessment of Climate Change could have considered matters beyond the context of impact assessment, it has attracted criticism for in fact focusing only on impact assessment, and not also taking stock of Canada's existing laws, policies, plans and programs relating to climate change, or assessing the additional measures that need to be in place to achieve Canada's commitment under the Paris Agreement.⁴ This issue can be addressed in the context of the strategic assessment of thermal coal mining by explicitly broadening the terms of reference to include consideration of policies and measures beyond the context of impact assessment. Strategic assessments of federal policies and programs outside the scope of impact assessments are indeed encouraged by the federal *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*.⁵

² *Department of the Environment Act*, RSC 1985, c E-10.

³ Environment and Climate Change Canada, "Terms of Reference for Conducting a Strategic Assessment of Climate Change" (February 2019), online: <https://www.strategicassessmentclimatechange.ca/strategic-assessment-of-climate-change-terms-of-reference>.

⁴ David V Wright, "Final Strategic Assessment on Climate Change: Zero Net Effect?" (10 August 2020), *ABlawg* (blog), online: <https://ablawg.ca/2020/08/10/final-strategic-assessment-on-climate-change-zero-net-effect/>.

⁵ Government of Canada, "Strategic Environmental Assessment: The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals" (Ottawa: 2010), online: <https://www.canada.ca/en/impact-assessment-agency/programs/strategic-environmental-assessment/cabinet-directive-environmental-assessment-policy-plan-program-proposals.html>.

It is our understanding that the term “strategic assessment” explicitly directs its conveners to study all aspects that relate to the object of assessment, and not leave out any details or categories of details that could affect or compromise a true understanding of the object of the assessment, in order to facilitate the development of a forward thinking and comprehensive strategy. Canada’s federal policies, plans, and programs are integral to a federally mandated strategic assessment. Narrowing the scope of a strategic assessment would result in an assessment that is not truly strategic.

Finally, in order to properly consider federal policies, plans and programs relating to thermal coal mining, my clients submit that the strategic assessment must identify and weigh the impacts and benefits of alternatives. The IAA requires consideration of alternative means in project-level impact assessments,⁶ and consideration of alternatives should be required in strategic assessments as well.

Recommendation: The context section should refer to the Minister’s powers under both the *Impact Assessment Act* and the *Department of the Environment Act*:

- Canada is launching a strategic assessment under the *Impact Assessment Act* and the *Department of the Environment Act* to solicit feedback on relevant policy considerations related to thermal coal mining and to consider the future of new thermal coal mine projects in Canada under federal review.

Recommendation: The objectives statement should be amended to add the underlined words:

- The strategic assessment of thermal coal mining will guide decision-makers on how thermal coal mine projects will be considered under the *Impact Assessment Act* and in federal policies, plans and programs, taking account of alternative scenarios.

c. Thermal coal export

Canada produces approximately 30 million tonnes of thermal coal a year, the vast majority of which has to date been used domestically.⁷ As Canada and its provinces move towards phasing out traditional coal-fired electricity by 2030,⁸ more Canadian thermal coal could end up being shipped to other countries.

Canada also already exports a large amount of thermal coal, some of which is mined domestically, but the majority of which is mined in the United States and exported through Canadian Ports. For example, approximately 11-13 million tonnes of predominantly American thermal coal are exported through the Port of Vancouver every year.⁹ Additionally, in the first 7

⁶ IAA, s 22(1)(e) and (f).

⁷ Coal Association of Canada, “Coal Production Stats” (2018), online: <https://www.coal.ca/coal-resources/about-the-coal-industry/coal-production-stats/>.

⁸ *Regulations Amending the Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*: SOR/2018-263, 2018 C Gaz II, Vol 152, No 25, online: <http://www.gazette.gc.ca/rp-pr/p2/2018/2018-12-12/html/sor-dors263-eng.html>.

⁹ Port of Vancouver, “2019 Statistics Overview” (Port of Vancouver, 2019), online: <https://www.portvancouver.com/wp-content/uploads/2020/03/Statistics-overview-2017-to-2019.pdf> at 11.

months of 2020, 3.1 million tonnes of thermal coal have been exported through Ridley Terminals, also on the west coast.¹⁰

The role of Canada's export terminals in exporting American coal is particularly problematic. Canada exports this much American coal due to stricter environmental regulations in U.S. coastal states (Washington, Oregon and California), which have led them to decline approvals to ship coal.¹¹ The fact that coal exporters may see Canada as an export haven for U.S. thermal coal is a serious issue relating to thermal coal mining in Canada that the strategic assessment should consider, particularly given Canada's role in leading the Powering Past Coal Alliance.

It is therefore important for the strategic assessment to consider issues relating to the export of thermal coal.

Coal export is associated with numerous potential local, pan-Canadian and international impacts including airborne coal dust from transport trains and coal stockpiled for shipment, toxic contaminants in runoff rainwater that can end up in environmentally sensitive waters and risks relating to fire and spillage from accidents which are often of great concern to local communities.¹² Such impacts should fall within the scope of the strategic assessment.

Recommendation: The objectives statement should be amended as follows:

- The strategic assessment of thermal coal mining will guide decision-makers on how thermal coal mine and export projects will be considered under the *Impact Assessment Act* and in federal policies, plans and programs.

2. Scope of the strategic assessment of thermal coal mining

The scope of the strategic assessment of thermal coal mining as stated in section 3 of the draft terms of reference is as follows:

The strategic assessment will include, but not be limited to:

- *Environmental and health impacts of thermal coal mining and end use of thermal coal such as the impacts on air, water, wildlife, greenhouse gas emissions and climate change, and related health impacts.*
- *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.*

¹⁰ Prince Rupert Port Authority, "Monthly Traffic Summary – For July 2020" online: https://www.rupertport.com/wp-content/uploads/cargoPDF/2020_July.pdf.

¹¹ Valerie Volcovici, "Coal firms plead to courts, Trump for West Coast export terminals" (29 January 2018), *Reuters*, online: <https://www.reuters.com/article/us-usa-coal-exports/coal-firms-plead-to-courts-trump-for-west-coast-export-terminals-idUSKBN1FJ0KB>.

¹² James Kerr, "Canada should not be shipping coal overseas for the U.S." (16 February 2019), *Vancouver Sun*, online: <https://vancouversun.com/opinion/op-ed/james-kerr-canada-should-not-be-shipping-coal-overseas-for-the-u-s>. [Kerr]

- *The use of thermal coal, including the export of thermal coal and its impact on Canada’s international commitments and initiatives. This strategic 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.*

My clients’ comments and recommendations are provided under the following headings:

a. Cumulative impacts

Coal mining operations are often located close to each other, given that coal reserves concentrate in specific parts of Canada. The Vista Coal Mine, for example, is located near to a number of other thermal and metallurgical coal mines including Obed Mine, McLeod River Mine, Coal Valley Mine, Gregg River Mine, Luscar Mine and Cheviot Mine.¹³ The scope of the strategic assessment should explicitly include reference to cumulative impacts, and the strategic assessment should consider how to assess and address cumulative impacts of thermal and metallurgical coal mines and other industrial activities.

One significant example of cumulative impacts is the effects of coal mining and other activities on fish species listed as at-risk under the federal *Species at Risk Act*, including the Athabasca Rainbow Trout and the Bull Trout. In its Analysis Report regarding designation of the Vista Coal Mine Phase II Project for an impact assessment, the Impact Assessment Agency noted that there was “high uncertainty as to whether the Project could be carried out in a way that will not jeopardize the survival and recovery of aquatic species at risk” given impacts on these fish species.¹⁴ Fish in the Athabasca region are particularly vulnerable due to the impact of cumulative industrial development in their critical habitat. Fisheries and Oceans Canada is currently in the process of the finalizing recovery strategy, including critical habitat identification, for the Athabasca Rainbow Trout.¹⁵

Explicitly mentioning cumulative impacts within the scope of the terms of reference would help to ensure that such impacts, including on aquatic species at risk, are considered during the strategic assessment.

Recommendation: The scope of the strategic assessment should explicitly reference cumulative impacts:

- Environmental and health impacts of thermal coal mining and end use of thermal coal such as the impacts on air, water, wildlife, greenhouse gas emissions and climate change, and related health impacts, including cumulative impacts.

¹³ Alberta Energy Regulator, “Coal Mine Map Viewer”, online: <https://extmapviewer.aer.ca/AERCoalMine/Index.html>.

¹⁴ Impact Assessment Agency of Canada, “Analysis Report: Whether to Designate the Coalspur Mine Ltd. Vista Coal Mine Phase II Project in Alberta” (December 2019), online: <https://aeic-iaac.gc.ca/050/documents/p80341/133221E.pdf> at 6.

¹⁵ Fisheries and Oceans Canada, “Rainbow Trout (*Oncorhynchus mykiss*) Athabasca River populations: recovery strategy, 2020 (proposed)”, online: <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/recovery-strategies/rainbow-trout.html>.

b. End use and export of thermal coal

It is encouraging to see that the Minister has included consideration of the end use of thermal coal, including greenhouse gas emissions (bullet point 1), and the export of thermal coal (bullet point 3) in the scope of the draft terms of reference. Consideration of these impacts, and in particular the greenhouse gas (“GHG”) emissions from the combustion of exported coal, is essential to a strategic assessment of thermal coal mining. Inclusion of these impacts is consistent with Canada’s commendable international action on the issue of thermal coal and its leadership in the Powering Past Coal Alliance. Canada’s international commitments and its reputation as a leader on this issue necessitates that these impacts be considered and assessed as a part of this process. Failure to assess such impacts would undermine the success of this strategic assessment and be contrary to the purposes of the IAA.

As the Minister and Environment and Climate Change Canada are well aware, thermal coal is a significant contributor to global GHG emissions. Lifecycle emissions from burning coal for energy generation are twice as high as those for natural gas, and ten to one hundred times higher than those for renewable energy sources.¹⁶ According to the International Energy Agency, coal-fired electricity generation has accounted for approximately 30% of GHG emissions or over 0.3°C increase in global average annual surface temperatures above pre-industrial levels.¹⁷ This makes coal the single largest contributor to global temperature rise.¹⁸

The major impact of thermal coal on global GHGs are recognized in the Context section of the draft terms of reference:

Combustion of thermal coal produces approximately 40 percent of the world’s and ten percent of Canada’s electricity. Consequently, coal is one of the most significant sources of carbon emissions and air pollution, which have significant environmental and health impacts.¹⁹

The Government of Canada has previously also recognized that “phasing out traditional coal power is one of the most important steps in tackling climate change and meeting the Paris Agreement commitment.”²⁰

¹⁶ Steffen Schlömer, ed, “Annex III: Technology-specific Cost and Performance Parameters” in *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge and New York: Cambridge University Press, 2014), online: https://www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_annex-iii.pdf at 1335.

¹⁷ International Energy Agency, “Emissions” in *Global Energy & CO2 Status Report 2019* (March 2019), online: <https://www.iea.org/reports/global-energy-co2-status-report-2019/emissions>.

¹⁸ *Ibid.*

¹⁹ Environment and Climate Change 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>. (Underline added)

²⁰ Government of Canada, “Coal phase-out: the Powering Past Coal Alliance”, online: <https://www.canada.ca/en/services/environment/weather/climatechange/canada-international-action/coal-phase-out.html>.

The impacts of GHG emissions, both from Canadian and global sources, in the form of climate change are already being felt in Canada. The average annual temperature in Canada has already increased by 1.7 °C, about double the global rate. In northern Canada, temperature has increased by 2.3 °C, approximately triple the global rate.²¹ As a result, global GHG emissions are already causing environmental effects within federal jurisdiction, and direct and incidental effects. For example, the Court of Appeal for Ontario recognized that human-caused GHG emissions are causing or exacerbating rising sea levels, ocean acidification, species loss and extinction, and threatening the ability of certain First Nations to maintain their traditional way of life or continue to exist as self-determining people.²²

The Government of Canada has also declared that the country is in a national climate emergency, recognizing the impacts that climate change is causing to Canadians and the environment, including on areas within federal jurisdiction.²³ Costs for increasingly violent extreme weather events such as Calgary’s recent hailstorm, and flooding in Fort McMurray continue to rise, particularly in the past 10 years.²⁴

As such, failure to consider impacts relating to end use and export would be contrary to the IAA’s purpose to “protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects”.²⁵ It would also be contrary to the precautionary approach adopted in the IAA, which is also an accepted principle of Canadian and international law.²⁶

This is particularly true given that a significantly greater quantity of coal is already being mined than is consistent with a safe emissions pathway. According to the 2019 Production Gap report, by 2030 countries intend to produce 150% (5.2 billion tonnes) more coal than is consistent with a 2°C pathway, and 280% (6.4 billion tonnes) more than is consistent with a 1.5°C pathway.²⁷ According to a Climate Analytics report, also published in 2019, coal power generation must peak by 2020, be reduced to 80% below 2010 levels by 2030 and be phased out before 2040 in order to meet targets set out by the Paris Agreement.²⁸

²¹ Government of Canada, “Changes in Temperature”, online: <https://www.canada.ca/en/environment-climate-change/services/climate-change/canadian-centre-climate-services/basics/trends-projections/changes-temperature.html>.

²² *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at paras 11-14.

²³ *House of Commons, Journals*, 42nd Parl, 1st Sess, No 435 (June 17, 2019) at 5661, available online: <https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-435/journals>.

²⁴ Insurance Bureau of Canada, “Severe Weather Caused \$1.3 Billion in Insured Damage in 2019” (21 January 2020), online: <http://www.ibc.ca/on/resources/media-centre/media-releases/severe-weather-caused-1-3-billion-in-insured-damage-in-2019>.

²⁵ *Impact Assessment Act*, SC 2019, c 28, s 1, s 6(1)(b). [IAA]

²⁶ IAA, s 6(1)(d); *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 31-32.

²⁷ SEI, IISD, ODI, Climate Analytics, CICERO, and UNEP, *The Production Gap: The discrepancy between countries’ planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C* (2019), online: <https://wedocs.unep.org/bitstream/handle/20.500.11822/30822/PGR19.pdf> at 4. [Production Gap Report]

²⁸ PA Yanguas Parra et al, *Global and regional coal phase-out requirements of the Paris Agreement: Insights from the IPCC Special Report on 1.5°C* (Climate Analytics, 2019), online: https://climateanalytics.org/media/report_coal_phase_out_2019.pdf.

The Production Gap report, published jointly by six international organizations, concluded that supply-side measures are a “key step toward closing the production gap” and ensuring that Paris Agreement targets can be met.²⁹ It is therefore clear that Canada’s commitments in respect of climate change require consideration of end use impacts of thermal coal produced in and exported from Canada.

Canada co-founded the Powering Past Coal Alliance, which commits its government members to the rapid global phase-out of unabated coal power and to the advancement of the transition to clean energy.³⁰ The strategic assessment must consider how Canada’s mining and export of thermal coal is consistent with its global leadership on this initiative, particularly in light of the production glut documented in the 2019 report. Indeed, the Production Gap report touts the Powering Past Coal Alliance as a forum where “coalitions of leading actors can work together to raise ambition through joint targets and actions that align future fossil fuel production with global climate goals”.³¹ It is difficult to see how the alliance could live up to this objective if Canada fails to assess the end use impacts of thermal coal production and export in this strategic assessment. The Powering Past Coal Alliance also falls under the scope of “Canada’s commitments in respect of climate change” under the *IAA*, as a non-binding instrument.³²

While Canada is a producer of thermal coal, it is also a significant exporter of thermal coal from the United States, as discussed above.³³ It is therefore important that the strategic assessment consider mining and export activities.

Requiring consideration of the end use of coal and its impacts on climate change, which would include the GHG emissions from the combustion of coal, in the strategic assessment of thermal coal mining is not inconsistent with Environment and Climate Change Canada’s strategic assessment of climate change. While the latter provides rules regarding the GHG accounting information that a proponent is to provide as a part of an assessment of a designated project, there are sector-specific considerations that must be taken into account with respect to the lifecycle impacts of thermal coal production and export on global GHG emissions. The strategic assessment should require these sector-specific considerations be taken account of in all phases of project impact assessment, from the planning phase through to the public interest determination.

End use and export impacts should also be considered in the strategic assessment’s recommendations on the broader policies, plans and programs of the Government of Canada

²⁹ *Ibid* at 41.

³⁰ Environment and Climate Change Canada, News Release: “The Government of Canada welcomes new Powering Past Coal members and announces support for phasing out coal at home and abroad” (13 December 2018), online: <https://www.canada.ca/en/environment-climate-change/news/2018/12/the-government-of-canada-welcomes-new-powering-past-coal-members-and-announces-support-for-phasing-out-coal-at-home-and-abroad.html>.

³¹ Production Gap report, *supra*, at 5. (Underline added)

³² Government of Canada, “Policy Context: Considering Environmental Obligations and Commitments in Respect of Climate Change under the Impact Assessment Act”, online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/considering-environmental-obligations.html>.

³³ Greg Quinn & Natalie Obiko Pearson, Canada Province Aims \$51-a-Ton Carbon Tax on U.S. Coal Exports (3 May 2017), Bloomberg, online: <https://www.bloombergquint.com/business/canada-province-aims-51-a-ton-carbon-tax-on-u-s-coal-exports>; above in “Thermal coal export” starting at p 3.

regarding thermal coal which, as described above, my clients submit should be included in the terms of reference for this strategic assessment.

Recommendation: The scope of the strategic assessment should include impacts of the end use of thermal coal, including on GHG emissions, and impacts relating to the export of thermal coal. Bullet points (1) and (3) of the scope of the assessment in the draft terms of reference should be adopted in their current form into the final terms of reference, subject to the amendment proposed in Recommendation 6 (see Appendix).

c. Indigenous peoples and their rights

The draft terms of reference include no mention of consideration of the impacts of thermal coal mining on Indigenous peoples or rights. This is a significant omission, given the importance of considering effects on Indigenous peoples and rights and including Indigenous peoples in decision making throughout the *IAA*.

This commitment is emphasized in the preamble to the Act:

Whereas the Government of Canada is committed, in the course of exercising its powers and performing its duties and functions in relation to impact, regional and strategic assessments, to ensuring respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*, and to fostering reconciliation and working in partnership with them;

One of the *IAA*'s purposes is "to ensure respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*, in the course of impact assessments and decision-making under this Act".³⁴ The purpose section further states that "[t]he Government of Canada, the Minister, the Agency and federal authorities, in the administration of this Act, must exercise their powers in a manner that (...) respects the Government's commitments with respect to the rights of the Indigenous peoples of Canada".³⁵

Decisions and processes conducted under the *IAA* should also support the findings of the Truth and Reconciliation Commission of Canada and the Government of Canada's commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples to "secure free, prior and informed consent for decisions that affect Indigenous peoples' rights and interests", as provided in the preamble and elaborated in Impact Assessment Agency of Canada ("Agency") guidance.³⁶

³⁴ *IAA*, s 6(1)(g).

³⁵ *IAA*, s 6(2).

³⁶ Impact Assessment Agency of Canada, "Interim Policy Context: Indigenous Participation in Impact Assessment", online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-policy-indigenous-participation-ia.html>; see also, Impact Assessment Agency of Canada, "Interim Guidance: Indigenous Participation in Impact Assessment", online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/interim-guidance-indigenous-participation-ia.html>, and Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: TRC, 2012), online: http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf, Calls to Action 43 and 44.

It is evident that thermal coal mining causes various impacts relating to Indigenous people that require consideration under the *IAA*: impacts on the physical and cultural heritage and traditional land uses of Indigenous peoples; on the health, social and economic conditions of Indigenous peoples; and on Aboriginal and Treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*.³⁷

For example, in assessing the proposed Vista Coal Mine expansion, the Agency noted the following concerns relating to the physical and cultural heritage and traditional land uses of Indigenous peoples:

- Gathering, fishing, and hunting opportunities;
- The ability to carry out a traditional way of life on the land;
- The health of wildlife from contaminant release (air, soil and water);
- Wildlife habitat and behaviour;
- Cumulative effects of multiple projects;
- Intergenerational knowledge transfer and cultural learning; and
- Pre-contact archaeological sites.³⁸

The Agency recognized the following concerns with respect to impacts on the health, social and economic conditions of Indigenous peoples:

- Health effects resulting from increased air emissions, release of coal dust, project-related noise, changes to water quality, and contamination of traditional foods;
- Health effects resulting from the potential spills;
- Economic, social and health impacts of reduction in access to traditional foods;
- Potential for permanent loss of Athabasca Rainbow Trout and Bull Trout, which are currently at-risk in thermal coal bearing areas;
- Social and cultural impacts of the disruption of intergenerational knowledge transfer as well as cultural learning; and
- Social and health impacts of the loss of tranquility and relationships with the land due to cumulative industrial development.³⁹

The Agency noted the following potential impacts on Indigenous rights:

- Taking up of lands within traditional territories;
- Adverse impacts on ability to exercise rights, including hunting, gathering and fishing rights; and
- Insufficient consultation and accommodation by the province and the proponent.⁴⁰

As stated in submissions of Louis Bull Tribe seeking designation of the Vista Coal Mine expansion, Indigenous rights include the right to hunt, fish, trap and gather; the right to perform

³⁷ See e.g. *IAA*, ss 2, 16(2)(c), 22(1)(c),(l), 36(2)(d) and 63(d).

³⁸ Impact Assessment Agency of Canada, “Analysis Report: Whether to Designate the Coalspur Mine Ltd. Vista Coal Mine Phase II Project in Alberta” (December 2019), online: <https://aeic-iaac.gc.ca/050/documents/p80341/133221E.pdf> at 7, 9, 19-23.

³⁹ *Ibid* at 6-7, 23-25.

⁴⁰ *Ibid* at 10.

ceremonies; the right to transmit Indigenous knowledge to subsequent generations; and the right to participate in practices reasonably incidental to other Indigenous rights.⁴¹ The loss of lands, waters and animals suitable to traditional activities is not only a loss of subsistence, but also a threat to “cultural norms, spiritual values, sense of self, place, and purpose, and knowledge” that are reflected in the relationship of Indigenous peoples with the land.⁴²

The scope of the strategic assessment must include consideration of thermal coal mining and export on Indigenous peoples, rights, laws and authority, including in terms of cumulative effects. This is necessary to ensure Indigenous peoples are able to contribute as equal collaborative partners in the strategic assessment, and to ensure that Indigenous knowledge, experiences and authority are recognized by the process.⁴³

Recommendation: The scope of the strategic assessment should be amended to add:

- Impacts of the mining and end use of thermal coal on Indigenous peoples, rights, laws and authority, including with respect to cumulative effects.

d. Market analysis of projected demand for thermal coal

The draft terms of reference state the scope of the strategic assessment of thermal coal mining will include market analysis of projected demand for thermal coal, including “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.”

This market analysis must take into account international agreements on climate change and other economic and environmental pressures and trends. Impacts relating to bankruptcy, write downs and impacts associated with operators’ inability to meet their environmental responsibilities should also be included within the scope of the market analysis. The financial details of long term costs related to environmental and human health impacts should also be included to provide a full picture of the costs of thermal coal development.

International agreements on climate change and other pressures and trends affecting coal demand

The market analysis must take into account international agreements on climate change and other economic and environmental pressures and trends. Such considerations are necessary to accurately reflect likely future scenarios of global demand for thermal coal mined in Canada.

⁴¹ Letter from MLT Aikins LLP to Minister Jonathan Wilkinson and Impact Assessment Agency of Canada re Request for Designation under the Impact Assessment Act of Coalspur Mine (Operations) Ltd.’s Vista Coal Mine Expansion (1 May 2020), online: <https://aeic-iaac.gc.ca/050/documents/p80731/134897E.pdf> at 14; *R v Sundown*, [1990] 1 SCR 393; *R v Badger*, [1996] 1 SCR 771.

⁴² *Ibid* at 16.

⁴³ LE Eckert et al, “Indigenous knowledge and federal environmental assessments in Canada: applying past lessons to the 2019 impact assessment act” (2020) 5: FACETS 67.

Considerations must include international treaties and domestic legislation and regulatory instruments implemented by countries around the world to reduce GHGs. It is critical that market demand for thermal coal scenarios reflect compliance with the UNFCCC Paris Agreement and the Powering Past Coal Alliance’s objectives. Specifically, the Powering Past Coal Alliance requires countries that are part of the OECD to entirely phase out coal fired electricity by 2030, and all other countries to entirely phase out coal fired electricity by 2050.⁴⁴

Considerations must also include the decreasing cost competitiveness of thermal coal relative to other fuels in a decarbonizing economy. The market analysis must include coal’s relative competitiveness in relation to renewable energy sources, which are increasingly at equal or lower price points to thermal coal and which are projected to be more economical than thermal coal in the future.⁴⁵ In considering coal’s relative competitiveness to renewable energies, the analysis must also consider projected increases in carbon pricing and carbon regulations. Current and future proposed plans for alternative energy projects at both a domestic and global level must also be taken into account.

The market analysis should also consider environmental pressure within the United States to reduce coal-fired electricity generation and the economic impacts of the reduction of U.S. demand. Reduced U.S. thermal coal consumption may also have implications for the international supply of thermal coal, which should be considered. Further, there may be foreseeable impacts on demand for thermal coal in the event that carbon pricing or other legislation is implemented in jurisdictions to which Canadian suppliers plan to export their coal.

Global events, such as the COVID-19 crisis and including the advancement of green recovery bills in jurisdictions across the world, may also affect demand for thermal coal and must be considered in the market analysis. The global financial viability of thermal coal now and in the future may well be impacted by these developments. Already, financial institutions and insurers are stepping back from the thermal coal industry; to date, over 100 globally significant banks and insurers have announced their divestment from coal mining and/or coal fired power plants.⁴⁶ The lack of financing capital and insurance could present current and increasing threats to the viability of any future thermal coal mines in Canada. This in turn will have implications for global coal demand, and ought to be considered in the strategic assessment.

The possibility of bankruptcy or inability to meet environmental requirements

There is an increasing trend of insolvency and bankruptcy of coal companies, with eight major coal companies in the United States declaring bankruptcy in 2019 alone.⁴⁷ In order to properly

⁴⁴ Government of Canada, “Coal Phase-Out: the Powering Past Coal Alliance”, online: <https://www.canada.ca/en/services/environment/weather/climatechange/canada-international-action/coal-phase-out.html>.

⁴⁵ International Renewable Energy Agency, “Renewable Power Generation Costs in 2019” (June 2020), online: <https://www.irena.org/publications/2020/Jun/Renewable-Power-Costs-in-2019>.

⁴⁶ The Institute for Energy Economics and Financial Analysis, “Over 100 and Counting” (25 August 2020), online: <https://ieefa.org/finance-exiting-coal/>.

⁴⁷ Clifford Krauss, “Murray Energy Is 8th Coal Company in a Year to Seek Bankruptcy”, *The New York Times* (29 October 2019), online: <https://www.nytimes.com/2019/10/29/business/energy-environment/murray-energy-bankruptcy.html>.

assess the impacts of thermal coal mining in Canada, the market analysis must consider how market forces may lead to stranded assets and industry bankruptcies as well as associated impacts on the environment, health and Indigenous peoples.

Particularly, the market analysis must consider how decreases in demand may increase the risk of a mine operator's inability to meet environmental responsibilities should a project become financially unstable, and related effects on the environment, health and Indigenous peoples. This requires an analysis not only of the risks of bankruptcy, but also of potential policies, practices and conditions that could be attached to approvals of future thermal coal mines that would ensure such impacts do not occur, or minimized should they arise.

Recommendation: The scope of the market analysis should 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 public costs incurred due to this sector, an analysis of impacts relating to bankruptcy, write downs and operators' inability to meet their environmental responsibilities, and projections of future domestic and global demand for thermal coal mined in Canada that take into account international agreements on climate change and other economic and environmental pressures and trends.

e. Methane

Methane (CH₄) emissions from coal production must also be considered in the strategic assessment. Methane is naturally trapped in coal seams and surrounding strata and is released into the atmosphere during coal production and after a coal mine has been abandoned.⁴⁸ The amount of methane emissions increases with coal mine depth.⁴⁹ A recent study by Kholod et al. suggests that methane emissions from coal mining are far greater than previous studies had projected, relying on a detailed analysis of methane emissions during both production and abandonment of coal mines.⁵⁰ Even with aggressive climate policies, methane emissions from coal mines are expected to grow globally⁵¹ and therefore are an important environmental impact that must be considered in the strategic assessment. Considering methane emissions from thermal coal mines in this strategic assessment and their impact on Canada's overall GHG emissions is essential to consider how thermal coal mining impacts Canadian efforts to meet its international commitments under the Paris Agreement.

Recommendation: Ensure that considering the impact of thermal coal mining on Canada's international commitments includes considering the impact of the methane release from coal mining on Canada's GHG emissions and international commitments.

⁴⁸ Kholod et al., "Global methane emission from coal mining to continue growing even with declining coal production" (2020) 256 Journal of Cleaner Production 1204892, online: <https://www.sciencedirect.com/science/article/pii/S0959652620305369>. [Kholod et al.]

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Kholod et al., *supra*.

3. Approach to conducting the strategic assessment of thermal coal mining

The approach to conducting the strategic assessment described in section 4 of the draft terms of reference indicates that the strategic assessment will be conducted by a committee of government officials. My clients strongly urge the Minister to revise this proposal and task an independent panel of credible experts that includes Indigenous representation with conducting the strategic assessment instead of an interdepartmental committee. Moreover, my clients encourage the Minister to ensure that robust processes for public and Indigenous consultation are incorporated within the terms of reference, to ensure that public participation is valued as the assessment progresses.

We understand that more detailed submissions on this topic are being prepared by West Coast Environmental Law and my clients encourage the Minister to adopt the recommendations set out in those submissions.

Recommendation: Task an independent expert committee with Indigenous members with conducting the strategic assessment.

Recommendation: Ensure the strategic assessment incorporates robust processes for public and Indigenous consultation.

4. Additional comments

The original announcement of the strategic assessment of thermal coal mining on December 20, 2019 referred to the fact that at that time the Vista Coal Mine expansion was not to be subject to review under the IAA.⁵² Now that Minister Wilkinson has designated the Vista Coal Mine expansion for an impact assessment it would be useful for the terms of reference to clarify that the strategic assessment will apply to the Vista Coal Mine expansion project as an existing impact assessment.

Based on the proposed timelines in the draft terms of reference, which my clients support, the strategic assessment of thermal coal mining will be complete well before the Vista Coal Mine expansion impact assessment reaches its conclusion. Therefore, there is no reason why the findings of the strategic assessment cannot be applied to the impact assessment. The strategic assessment of thermal coal mining will provide for a more informed impact assessment of the Vista Coal Mine expansion. Furthermore, failing to apply the strategic assessment to all future thermal coal mine projects would undermine the purpose of the “strategic” assessment.

⁵² Environment and Climate Change Canada, News Release: “Canada launches strategic assessment of thermal coal mining” (20 December 2019), online: <https://www.canada.ca/en/environment-climate-change/news/2019/12/canada-launches-strategic-assessment-of-thermal-coal-mining.html>.

Given Canada's clear commitment to phasing out coal-fired electricity and decreasing global demand for thermal coal, it is not clear how many more large-scale thermal coal mining projects will be proposed in coming years. Therefore, it is very important that the strategic assessment apply to any and all current and future thermal coal mines, including the recently designated Vista Coal Mine expansion.

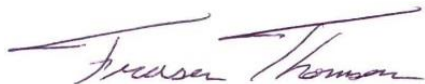
Recommendation: For greater clarity, the context section should confirm that the strategic assessment will apply to all current and future impact assessments of thermal coal projects.

5. Conclusion

A strategic assessment on thermal coal can provide meaningful evaluation of how Canada will respond to the risks posed by thermal coal. The success of this assessment will determine whether Canada is able to lead on this important global issue or whether we fail to rise to the challenges and opportunities it presents. Provided the recommendations set out in the above letter are addressed, this assessment can ensure that Canada's action on thermal coal matches its ambition. My clients request that you to address the above referenced recommendations and look forward to participating in this important process.

Thank you again for providing this opportunity to comment on this important process.

Sincerely,



Fraser Thomson
Barrister & Solicitor

Appendix: Summary of Recommendations

1. Context

Recommendation 1: The context section should refer to the Minister's powers under both the *Impact Assessment Act* and the *Department of the Environment Act*:

- Canada is launching a strategic assessment under the *Impact Assessment Act* and the Department of the Environment Act to solicit feedback on relevant policy considerations related to thermal coal mining and to consider the future of new thermal coal mine projects in Canada under federal review.

Recommendation 2: For greater clarity, the context section should confirm that the strategic assessment will apply to all current and future impact assessments of thermal coal projects.

2. Objectives

Recommendation 3: In the objectives statement, the word “new” preceding “thermal coal mine projects” should be removed, or else the objectives statement should be otherwise clarified to confirm that the strategic assessment will apply to all thermal coal mine projects designated under the *Regulations* or s. 9(1) of the *IAA*.

Recommendation 4: The objectives statement should be amended to add the underlined words:

- The strategic assessment of thermal coal mining will guide decision-makers on how thermal coal mine projects will be considered under the *Impact Assessment Act* and in federal policies, plans and programs, taking account of alternative scenarios.

Recommendation 5: The objectives statement should be amended as follows:

- The strategic assessment of thermal coal mining will guide decision-makers on how thermal coal mine and export projects will be considered under the *Impact Assessment Act* and in federal policies, plans and programs.

3. Scope of the strategic assessment of thermal coal mining

Recommendation 6: The scope of the strategic assessment should explicitly reference cumulative impacts:

- Environmental and health impacts of thermal coal mining and end use of thermal coal such as the impacts on air, water, wildlife, greenhouse gas emissions and climate change, and related health impacts, including cumulative impacts.

Recommendation 7: The scope of the strategic assessment should include impacts of the end use of thermal coal, including on GHG emissions, and impacts relating to the export of thermal coal. Bullet points (1) and (3) of the scope of the assessment in the draft terms of reference should be adopted in their current form into the final terms of reference, subject to the amendment proposed in Recommendation 6.

Recommendation 8: The scope of the strategic assessment should be amended to add:

- Impacts of the mining and end use of thermal coal on Indigenous peoples, rights, laws and authority, including with respect to cumulative effects.

Recommendation 9: The scope of the market analysis should 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 public costs incurred due to this sector, an analysis of impacts relating to bankruptcy, write downs and operators' inability to meet their environmental responsibilities, and projections of future domestic and global demand for thermal coal mined in Canada that take into account international agreements on climate change and other economic and environmental pressures and trends.

Recommendation 10: Ensure that considering the impact of thermal coal mining on Canada's international commitments includes considering the impact of the methane release from coal mining on Canada's GHG emissions and international commitments.

4. Approach to conducting the strategic assessment of thermal coal mining

Recommendation 11: Task an independent expert committee with Indigenous members with conducting the strategic assessment.

Recommendation 12: Ensure the strategic assessment incorporates robust processes for public and Indigenous consultation.

Strategic Assessment of Thermal Coal Mining

Environment and Climate Change Canada
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Email: ec.esemct-satcm.ec@canada.ca

September 4, 2020

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)¹ 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).² 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

¹ 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].

² 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:³ 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,⁴ 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).⁵ 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).⁶

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

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

⁴ 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>.

⁵ 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.

⁶ 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.”⁷ 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.”⁸ The SATC should assess the export of

⁷ SATC Draft TOR, *supra* note 1, s 3.

⁸ 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*⁹ 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.¹⁰ 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

⁹ RSC 1985, c E-10.

¹⁰ 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.¹¹ 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).

¹¹ 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.

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.¹² 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

¹² 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.¹³

¹³ 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:¹⁴

- 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.¹⁵ 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.”¹⁶ Other purposes

¹⁴ *Ibid* at 41-42.

¹⁵ *Ibid* at 8-18.

¹⁶ IAA, s 6(1)(h).

include respect for Indigenous rights and promotion of cooperation with Indigenous peoples.¹⁷ 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.



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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."

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.

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

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

¹⁷ IAA, s 6(1)(f)-(g).

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.”

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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**