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Revisions to the two-month-old *Impact Assessment Act* Climate Change Guidance... Already?

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Document Commented On: *Impact Assessment Act*, [SC 2019, c 28 s 1](#); Environment and Climate Change Canada, [Updated Strategic Assessment on Climate Change](#) (Gatineau: ECCC, 2020)

Earlier this month, just two months after releasing the final Strategic Assessment on Climate Change (SACC), which is the principal guidance document for implementing the *Impact Assessment Act* (IAA) climate change provisions, Environment and Climate Change Canada (ECCC) has issued an update. The reason behind this timing is unclear, particularly given that the explicitly stated term for review and update of the guidance is every five years (at 1.1). In any event, the update includes changes on three points, two of which introduce substantial shifts. This short post summarizes and comments on the changes, building on previous SACC posts [here](#), [here](#), and [here](#).

“Updates”

The October 2020 “update” makes changes in three areas: offset credits (Section 3.1.1), avoided domestic GHG emissions (Section 3.1.1), and the credible plan to reach net zero by 2050 (Section 5.3). While these are called updates and “[clarifications](#)”, a more appropriate characterization would be “revisions”, as two of the three changes are quite consequential. The least consequential revision is an adjustment in the language dealing with the vintage of offsets, now stating, “[a]ny offset credits used to compensate for project emissions should have been issued no more than 5 years before the year the emissions occurred”. This point was reasonably clear in the [July 2020 final SACC](#) but the revised text provides more clarity.

Avoided Domestic Emissions – SACC revisions

The revised SACC introduced the following addition:

“Avoided domestic GHG emissions can also include GHG emissions removed as a result of mitigation measures separate from the project and not reflected in the project’s direct GHG emissions. This could include, for example, action taken at the corporate level in Canada, such as the use of direct air capture technology and afforestation, provided that action is not required by law, is not also counted as offset credits (see below), and can be assigned to the project.” (at 7)

This significantly expands, or at least clarifies the expansiveness of, flexibility for project proponents. It essentially provides a basis for proponents to reduce a designated project's net GHG emissions (as defined at 5) by counting *any* GHG emission reduction activity *anywhere* within its corporate activities in Canada so long as that reduction is not required by law, not counted as an offset, and can be assigned to the project.

On one hand, such flexibility is consistent with the reality that because greenhouse gas emissions (GHGs) co-mingle in the atmosphere, and because climate change impacts are felt globally (unlike localized air pollution), it doesn't necessarily matter where emissions reductions occur (subject to thorny fairness dimensions – see [here](#) for a slice of this commentary). However, this shift represents a significant step away from long-standing practice to focus a project-level assessment on that specific project's impacts and potential adverse effects, and to not count what else may be happening on the “corporate level”. Expanding the scope of assessment to include corporate level actions is unusual indeed, though apparently increasingly common given that this is also a core part of the other SACC change regarding net-zero emissions plans (see below).

Concerns on this front might be alleviated by the qualifiers (must be in Canada, not required by law, not counted as offset credits, and can be assigned to the project – though the latter is rather cryptic), as well as the fungible nature of GHG emissions, which makes this aspect of a project's impacts different from those on endangered species or water quality, for example. There is, however, a residual concern that seems left out of the equation: enforceability. It is not clear how a proponent who relies on ‘action at the corporate level’ elsewhere in Canada can then be held accountable by the project-specific approval regime. Though not stated clearly in this part of the guidance, one option might be approval conditions, a tool noted explicitly in the net-zero aspect discussed below. However, it would be awkward indeed for a project-specific approval condition to require emissions reduction activities “at the corporate level”, outside the sphere of specific project activities. The simple fix here is to confine emissions reductions to the project itself, but clearly there was an appetite to offer industry more flexibility on this aspect.

Net-Zero by 2050 – SACC revisions

As explained in my previous post, the July 2020 “final” SACC directed “proponents of projects with a lifetime beyond 2050 to provide a credible plan to achieve net-zero emissions by 2050” (at 1). That requirement was then integrated throughout key stages of the IAA process. The October 2020 revision provides additional information regarding the “credible plan” concept. Specifically, the revision indicates that:

“[a] net-zero plan does not need to describe every technology or practice the project will implement over time to achieve net-zero emissions. Proponents can describe the process they will follow in order to make the decisions and investments needed to achieve net-zero emissions by 2050. A net-zero plan should describe emissions reductions at specified intervals up to 2050 and seek to maximize absolute emissions reductions in the earlier years of a project's lifespan” (at 5.3).

This goes some distance to addressing the ambiguity in the ‘credible plan’ concept that was present in the July 2020 SACC. While still not completely clear, it should manage expectations

and planning on all sides, including the government's own pathways to achieving the [2050 net-zero commitment](#).

Interestingly, the SACC revision also added that a credible plan “can refer to the corporate’s [sic] net-zero emissions plan” (at 16). This latter point certainly reminds me of a conclusion of the [Kearl Oil Sands joint review panel](#), reconvened in 2008 following the decision in *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, [2008 FC 302](#). The court found that the panel failed to provide any rationale for its conclusion that the Kearl project’s GHG emissions were not a significant adverse environmental effect, so the panel reconvened and issued an addendum wherein it held that despite the proponent not developing a project-specific GHG management plan, the proponent’s corporate energy efficiency program, along with other measures, were “an effective surrogate”.

Presumably, this new feature of the SACC will require much more than that minimalist “surrogate” approach that somehow passed muster in the Kearl project context. There should at least be a reasonably clear tie between the corporate net-zero emissions plan and the specific project under review. Even with such a clear tie, however, this aspect of the revision to the net-zero guidance offers proponents significant latitude by providing the basis for pointing to actions and operations far removed from the specific project at issue. And there’s more. The revised SACC adds the following:

The submission of a plan that does not specify how a project will achieve net-zero emissions by 2050 will not disqualify a project from proceeding through the impact assessment process. Where it is not feasible to specify how later-year reductions will be achieved, if the project is approved, the Minister of Environment and Climate Change may require a proponent to update plans to specify how additional emissions reduction will be achieved (refer to Section 7) as a condition in the Decision Statement.

It is difficult to know how to interpret this. The revision seems to be saying that failure to include a credible plan to achieve net-zero emissions by 2050 is not a show-stopper for the whole project. However, short of not being ‘disqualified’, it is unclear what the consequences would be for failure to produce a net-zero plan. Implicit in the second sentence is the notion that not providing a plan should only happen in contexts where it is “not feasible to specify how later-year reductions will be achieved”, and that in such circumstances the Minister may impose approval conditions that require a proponent to provide net-zero plans and updates to those plans during a project’s operations phase. At first blush, this may seem like reasonable balance and flexibility; however, to the extent that those approval conditions point to ‘corporate-level activities’ separate from the specific project, this approach raises the same issues described above – i.e. it is awkward for a project-specific approval condition to require emissions reduction activities “at the corporate level” and outside the sphere of specific project activities. There is also the risk that such conditions go unenforced, as has been [observed by the federal Commissioner of the Environment and Sustainable Development](#) in the federally regulated pipelines context in the past.

Conclusion

It is odd to see substantial revisions so soon after release of the “final” SACC, especially given the relatively slow and inclusive nature of the SACC process and the SACC formal review and update period being set at every five years. Setting aside that aspect, including any potential concerns around public participation and transparency in the development of this set of recent changes, it is clear that two of the three revisions are significant. The revised guidance provides significant latitude in how proponents may calculate a project’s net emissions – i.e. through the ability to point to GHG emissions reduction actions ‘at the corporate level’ elsewhere in Canada, separate and apart from the project under review. Proponents have also gained significant latitude in net-zero emissions planning by being able to point to a corporate-level net-zero emissions plan rather than a project- specific plan, and by having flexibility to not include a net-zero emissions plan in situations where the proponent sees such planning as infeasible. This is all in addition to the virtually unlimited use of offset credits, as set out in the guidance (at 7).

Taking these two changes together, and reflecting on the significant room to manoeuvre that already existed in the July 2020 final SACC (as explained [here](#)), it is clear that proponents and decision-makers have much flexibility in how to present and assess GHG information in the IAA process. We are now very far from a bright line “climate test”, as called for by some (see [here](#)). From offsets, to avoided domestic emissions, to perceived downstream emission reductions, to net-zero emissions planning, the SACC provides multiple ways to present a project in a low-emissions light and thus satisfy the guidance, and presumably the IAA climate-related requirements in the assessment and decision-making phases. Of course, flexibility in how and where to achieve emissions reductions has been a core feature of climate change mitigation law and policy for a long time, including under the 1997 [Kyoto Protocol](#). This is not new. However, it *is* new in the impact assessment realm. This will take some getting used to, and certainly robust [monitoring, reporting and verification](#) will be critical in this new area of IAA implementation, as it is in all GHG emissions management regimes. These perspectives and more are set out in my forthcoming paper, “Climate Change Considerations in the Federal Impact Assessment Act: Steps Forward... on a Path to Business As Usual?”, a draft of which is available [here](#).

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