

Securing a fair, effective and robust oil and gas emissions cap

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We are pleased to submit these comments on behalf of West Coast Environmental Law on the July 2022 discussion paper on a federal oil and gas emissions cap.¹ West Coast Environmental Law is a non-profit group of environmental lawyers and strategists dedicated to safeguarding the environment through law. Since 1974, we have successfully worked with communities, non-governmental organizations, the private sector and all levels of government, including First Nations governments, to develop proactive legal solutions to protect and sustain the environment.

Introduction

For decades, Canada has been setting (and missing) greenhouse gas (GHG) reductions targets. For just as long, the oil and gas sector's emissions have risen, erasing the reductions achieved in other sectors; as of 2020 emissions from the sector comprise 27% of Canada's total emissions.² Establishing the federal benchmark and Output-Based Pricing System (OBPS, or carbon tax) under the *Greenhouse Gas Pollution Pricing Act*, along with other federal emissions-reductions regulatory initiative, have been welcome steps towards ensuring that industrial emitters reduce their emissions in line with what is needed for Canada to meet its 2030 and 2050 targets. However, they are not guaranteed to drive down oil and gas-sector emissions to the degree necessary, or indeed at all, especially given recently-reported windfall profits in the sector that could make the carbon tax a worthwhile price to pollute.³ Current federal projections suggest that under current climate policy the sector's emissions in 2030 will be well above 2005 levels and about the same as current emissions levels.⁴

We were pleased to see the federal commitment to “cap oil and gas sector emissions at current levels and ensure that the sector makes an ambitious and achievable contribution to meeting the country's 2030 climate goals.”⁵ As the discussion paper notes, our emissions reductions must be both deep and

¹ Canada, *Options to Cap and Cut Oil and Gas Sector Greenhouse Gas Emissions to Achieve 2030 Goals and Net-Zero by 2050: Discussion Document* (July 2022) [“Discussion Paper”]: <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/oil-gas-emissions-cap/options-discussion-paper.html>.

² Environment and Climate Change Canada, *National Inventory Report, 2022*: <https://publications.gc.ca/site/eng/9.502402/publication.html>.

³ CBC News, “Canada's oilpatch is flush with cash — so what are they going to do with it?” (18 August 2022): <https://www.cbc.ca/news/business/bakx-wti-brent-profit-oilpatch-2022-1.6552917>.

⁴ The projections suggest that the industry will produce 27 Mt per year more than in 2005 by 2030, 4 Mt less than 2019 levels and 8 Mt more than 2020. However, those figures include reductions in emissions from refining oil and gas. Without these reductions, emissions from production are 54 Mt up from 2005 levels: Table A.2 in Annex 1 to Environment and Climate Change Canada, *Canada's Greenhouse Gas and Air Pollutant Emissions Projections 2021*: https://publications.gc.ca/collections/collection_2022/eccc/En1-78-2021-eng.pdf.

⁵ Rt. Hon. Justin Trudeau, P.C., M.P., Letter to Minister Guilbeault re “Minister of Environment and Climate Change Mandate Letter” (16 December 2021): <https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-environment-and-climate-change->

fast if we are to avoid the most severe effects of climate change, yet the oil and gas sector's emissions are trending opposite of that goal.⁶ After years of unmet targets and stalled efforts, Canada needs to ratchet up efforts to do its fair share towards limiting global temperature rise to no more than 1.5 degrees. These recommendations are aimed at achieving that objective for oil and gas sector emissions.

Recommendations

1. The best option for aligning oil and gas emissions with Canada's fair share

We favour a cap-and-trade approach for implementing the cap, for three reasons: first, we believe cap and trade, if implemented well, has the greatest chance of driving oil and gas sector emissions down to where we need them to be in order to help ensure Canada meets its emissions reductions target and does its fair share towards keeping global temperature rise to within 1.5 degrees. Second, cap and trade has a greater chance of sustaining a legal challenge than does creating an oil and gas-specific carbon price. Third, cap and trade under the *Canadian Environmental Protection Act* (CEPA) would not require amendments to legislation, whereas an oil and gas-specific carbon price would, and would therefore be at greater risk of watering down and delay.

Regarding the first reason, cap and trade would actually deliver on the government's commitment, providing a regulatory cap on emissions from the oil and gas sector. As the discussion paper notes, the second option, modifying carbon pricing systems for the oil and gas sector, would see the emissions cap trajectory set out in policy rather than regulations.⁷ As such, it would not actually function as a cap, but rather a policy objective, and would be largely unenforceable. While adjustments to the pricing mechanism could be made pursuant to subsequent reviews to realign the sector's emissions with the cap, that course-correction would occur after the damage is done and the cap has been or will be exceeded. A cap-and-trade scheme, on the other hand, would see a declining oil and gas emissions cap set in regulations, with enforceable provisions and fines to ensure facilities emit no more than their allowed amounts. So long as a cap-and-trade system does not contain loopholes (see section 7, below), it would provide the certainty we need that the sector's absolute emissions will actually, finally, decrease at the capped amount.

The second reason pertains to the constitutionality of the chosen method: we believe that an oil and gas cap-and-trade system has a greater chance of being found to be constitutional than a sector-specific pricing system under the GGPPA, should either be challenged in court. While the Supreme Court of Canada upheld the GGPPA in 2021,⁸ the judges were not unanimous in their opinions on the constitutionality of the Act. Three of the nine Supreme Court justices held that the GGPPA was unconstitutional, compared with six who found it to be within Parliament's authority to enact. For the majority judges in favour of the GGPPA, it appeared relevant that the OBPS applies broadly across

[mandate-letter](#); Rt. Hon. Justin Trudeau, P.C., M.P., Letter to Minister Wilkinson re "Minister of Natural Resources Mandate Letter" (16 December 2021): <https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-natural-resources-mandate-letter>.

⁶ Canada, Discussion Paper *supra* note 1 at 5; Canada, *Canada's 2030 Emissions Reduction Plan*: <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/climate-plan-overview/emissions-reduction-2030/plan/chapter-2.html#toc8>.

⁷ Discussion Paper, *ibid* at 23.

⁸ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

Canada, both territorially and respecting the industrial facilities covered by it.⁹ For example, the majority found that:

“... no aspect of the discretion provided for in Part 2 permits the Governor in Council to regulate GHG emissions broadly or to regulate specific industries in any way other than by setting GHG emissions limits and pricing excess emissions across the country. Instead, the OBPS uses GHG intensity standards to set emissions limits and price emissions beyond those limits in order to create incentives for behavioural change across industries.”¹⁰ [Emphasis added]

Admittedly, the majority’s concern with the breadth of the OBPS appeared to primarily lie in its geographical coverage – i.e., that it set minimum price stringency across all provinces. However, it is possible the courts might rule that targeting one specific industry with a different benchmark price would undermine at least some of the majority judge’s reasons for deciding it is an acceptable use of the peace, order and good government power under section 91 of the constitution. The likelihood of a legal challenge increases if the targeted industry is oil and gas, given anticipated blowback from prairie provinces.

CEPA, on the other hand, is on more secure constitutional ground. Enacted in 1999, it has been a pillar of federal environmental protection law for decades, and has been upheld as squarely within federal jurisdiction under its federal criminal law power.¹¹ The Federal Court of Appeal has upheld CEPA regulations aimed at reducing GHGs as a valid exercise of the criminal law power,¹² and legal experts (including West Coast) believe that a cap-and-trade system would fall within the scope of the criminal law power.¹³ Accordingly, we have greater confidence that a cap-and-trade regulation under CEPA would withstand judicial scrutiny for constitutionality than would an oil-and-gas specific pricing system under the GGPPA.

Finally, in a September 9, 2022 webinar on the proposed options for the cap, officials noted that creating an industry-specific pricing mechanism would require amendments to the GGPPA. We are concerned that any option that requires amending legislation and not simply enacting regulations would take longer and have a higher risk of being weakened or killed in Parliament. As we saw with Bill C-69 in 2018-2019, the new relative independence of the Senate means that it has considerable potential to filibuster or significantly amend legislation, and in the case of an oil and gas emissions cap, such amendments are far more likely to make the cap weaker rather than stronger. Amendments may take time to draft and receive Cabinet approval, and while the next federal election is not scheduled until 2025, there is a chance that a bill to amend the GGPPA to allow for sector-specific carbon pricing could be delayed by debate in both chambers until it dies on the order paper, especially if an earlier election is

⁹ *Ibid* at paras 67, 72-73.

¹⁰ *Ibid* at para 76.

¹¹ *R v Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 SCR 213.

¹² *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160 (CanLII).

¹³ See, e.g., Joseph F. Castrilli, “Legal Authority for Emissions Trading in Canada: Submitted to Pilot Emission Reduction Trading (PERT)”, in Elizabeth Atkinson, *The Legislative Authority to Implement a Domestic Emissions Trading System (National Roundtable on the Environment and the Economy, January 1999)*: https://publications.gc.ca/collections/collection_2013/trnee-nrtee/En133-5-1-1999-eng.pdf; Nathalie J. Chalfour, “Canadian Climate Federalism: Parliament’s Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax” 36 *Nat’l J. Const. L.* 331 at 26: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2775370; Martin Olszynski, “Study of the proposal for a greenhouse gas emissions cap on the oil and gas sector” (17 February 2022) at 4: <https://www.ourcommons.ca/Content/Committee/441/RNNR/Brief/BR11637864/br-external/OlszynskiMartin-e.pdf>.

called. The science is unambiguous: we cannot afford further delay in climate action, or half-measures. Therefore, a mechanism that would bring in a cap through regulations without requiring legislative amendment – as would be possible under sections 322 and 326 of CEPA – would be preferred.

Auctioning

West Coast believes in the polluter pays principle. Accordingly, we recommend that allocations be distributed through auction rather than freely allocated, and that prices reflect the true cost to pollute. This approach both increases market efficiency and provides a needed source of revenue that can be used to fund other action to prepare for climate change. If the government decides that some free allocation is necessary (for example, to avoid carbon leakage), those allocations should be small, ratcheted down over time, and eliminated once a border carbon adjustment mechanism is in place.

2. Target and trajectory

For too long, the oil and gas industry has been allowed to increase its emissions as other sectors have cut theirs. The science is clear that we must cut our emissions dramatically within this decade if we are to avoid the worst impacts of climate change. As a result, we recommend that the cap be set at 2020 numbers (the last reported year), come into force immediately with the promulgation of the regulations, and have a sharp downward trajectory to 2030. That approach would be consistent with Prime Minister Trudeau’s pledge that the emissions cap would “cap oil and gas sector emissions today and ensure they decrease tomorrow at a pace and scale needed to reach net-zero by 2050.”¹⁴

Leading climate groups have found that Canada’s “fair share” of global reductions needed to limit warming to 1.5 degrees is 60% below 2005 levels by 2030, and oil and gas sector emissions should reflect that amount. As the sector’s emissions were 171 megatonnes of carbon dioxide equivalent (MT CO₂eq) in 2005, that would make the 2030 cap 68.4 MT CO₂eq.

At a minimum, oil and gas emissions should be cut by the same amount as Canada has pledged as its national target – 40-45% by 2030. Given the industry’s laggardly progress to date (its emissions have increased dramatically since industry leaders first pledged to reduce emissions in the 1990s), we believe its share should be the higher end of that range.

3. Scope - activities

In our view, to be effective the cap must be comprehensive in scope, applying to all oil and gas facilities in Canada, including refineries, pipelines and liquefied natural gas facilities, regardless of whether they are subject to other emissions reductions requirements. If there is a risk of carbon leakage (for example, with refineries moving to the US), those could be added following the negotiation of a border carbon adjustment.

4. Emissions coverage

We also recommend that the scope of emissions covered be comprehensive, and include methane. We do not see why proposed methane regulations and a cap-and-trade system could not be compatible, for example with methane regulations helping industry’s emissions stay within their allocations. In our view, the purpose and primary benefit of an oil and gas emissions cap is the certainty it could provide that the

¹⁴ John Paul Tasker, “Canada will put a cap on oil and gas sector emissions, Trudeau tells COP26 summit” (CBC News, 1 November 2021): <https://www.cbc.ca/news/politics/trudeau-cop26-cao-oil-and-gas-1.6232639>.

sector's emissions will decline in alignment with what is needed for Canada to meet its targets and commitments, but for it to deliver on that certainty, it will need to cover all GHGs.

5. Offsets and compliance flexibility

We have significant apprehensions with the incorporation of compliance flexibilities, given their potential to render an emissions cap ineffective. After decades of rising emissions from the oil and gas sector, real reductions are needed now.

Cap and trade systems by their nature are about providing flexibility, since they do not require any one company to achieve emissions reductions. Companies that have a plan to reduce emissions in the mid-term can buy tradable credits in the short term.

This flexibility will be greatest if the cap and trade structure is wide in scope – including both refineries and methane. Refineries have been a major source of GHG reductions for the industry to date and many options for rapid reduction of methane emissions exist. The potential for short-term options in these areas can provide the sector with flexibility for harder-to-decarbonize areas. Conversely, excluding the industrial processes and gases for which reduction options are most readily available could make it more difficult for the industry to achieve its targets without also introducing other flexibility options.

Further compliance mechanisms risk undermining the effectiveness of the mechanism in reducing emissions, while also increasing the complexity and administrative costs of the regulatory system. While the purpose and dominant effect of a federal cap-and-trade system must be related to reducing emissions, not production, the government is not obligated to introduce artificial flexibility that undermines actual reductions simply to ensure that the industry can maintain or increase its production.

To the extent that the government disregards this advice, we recommend that compliance flexibilities only be contemplated where the following criteria are met:

1. The flexibilities are necessary to avoid locking in dead-end technologies and practices;
2. The permitted use of offsets or similar mechanisms should be capped at a minimal amount (5% or less) and decline to zero by 2030; and
3. Any flexibilities used in lieu of absolute reductions be compensated for by an equal amount of absolute reductions in subsequent years. For example, a facility that relies on compliance flexibilities to offset 5% of its emissions from 2023-2030 would have to make up that amount in the period 2030-2035.

Conclusion

An oil and gas emissions cap has the potential to significantly help Canada reach its emissions target – or even meet its more ambitious fair share of emissions reductions. However, that potential depends greatly on what mechanism is chosen, how it is designed and how it is implemented. We recommend a cap-and-trade system for its certainty and efficiency, and that the regulation be structured to maximize absolute emissions reductions along an ambitious trajectory to 2030 and 2050. We welcome this opportunity to weigh in on the design of the cap, and look forward to further engagement opportunities.

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