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## Coal Law and Policy in Alberta, Part Three: Was the Public Rationale for Rescinding the Coal Policy Ever Convincing?

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**Matter Commented On:** Information Letter 2020-23, “[Rescission of A Coal Development Policy for Alberta and new leasing rules for Crown coal leases](#)” (15 May 2020)

While Minister Savage announced the [temporary reinstatement](#) of the [1976 Coal Development Policy \(CDP\)](#) on February 8, 2021, it still seems worth examining the public justification offered by the Government of Alberta for rescinding the CDP. The principal justification advanced was that the CDP was obsolete in light of developments in law and regulation. One version of this justification was posted on the [coal policy guidelines page](#) of the Department of Energy’s web page. The text is no longer available online, but it read as follows:

The Coal Policy was originally published in 1976, before modern regulatory processes existed. The scope of the policy was wide-ranging and included, among other items, a land use classification system.... When these categories were created, land use planning hadn’t yet been completed, supporting infrastructure was lacking and there were environmental concerns that the existing regulatory processes weren’t equipped to address.

With the various regulatory, policy and planning advancements over the past 45 years, the Coal Policy became obsolete.

...

All coal development projects will continue to be considered through the existing rigorous Alberta Energy Regulator review process. This review is based on each project’s merits, including its economic, social and environmental impacts.

The original intention of the Coal Policy was to ensure that there were appropriate regulatory and environmental protection measures in place before new coal projects were authorized—this objective is being met by today’s modern regulatory, land use planning and leasing systems.

The introductory paragraphs of the information letter revoking the CDP convey a similar message (Information Letter 2020-23, “[Rescission of A Coal Development Policy for Alberta and new leasing rules for Crown coal leases](#)” (15 May 2020)).

It is undoubtedly the case that there have been some significant changes in the legislative landscape in the province since 1976. The CDP usefully listed (at i) the key statutory tools for regulating coal development that were in force back in 1976 in Alberta:

The Clean Air Act, The Clean Water Act, The Coal Conservation Act, The Coal Mines Safety Act, The Forests Act, 1971, The Forest and Prairie Protection Act, The Freehold Mineral Taxation Act, The Land Surface Conservation and Reclamation Act, The Mines and Minerals Act, The Public Highways Act, The Public Lands Act, The Surface Rights Act, and The Water Resources Act.

The most significant changes in the legislative landscape since 1976 are probably threefold. *First*, Alberta's keystone environmental statute is now the *Environmental Protection and Enhancement Act*, [RSA 2000, c E-12](#) (EPEA). This statute occupies the field that used to be occupied by the *Clean Air Act*, *The Clean Water Act*, and the *Land Surface Conservation and Reclamation Act*. It also provides for project-based environmental assessments. A *second* key development was the adoption of a [Land-use Framework](#) (2008) and the associated *Alberta Land Stewardship Act*, [SA 2009, c A-26.8](#) (ALSA). The Land-use Framework was adopted to address concerns that "rapid growth in population and economic activity is placing unprecedented pressure on Alberta's landscape" (at 6). The Framework recognized that this required "developing and implementing a land-use system that will effectively balance competing economic, environmental and social demands" (*ibid*). The ALSA paved the way for the adoption of landscape level land use planning and as such, it does have the *potential* to make obsolete the land use categories of the CDP. A particularly important part of the Framework was its emphasis on the cumulative effects of environmental disturbance on the landscape and the limitations associated with project-based assessments. This was recognized by the adoption of a strategy on cumulative effects which proposed that: "[c]umulative effects management will be used at the regional level to manage the impacts of development on land, water and air" (at 19; see also ALSA s 1(2)(d)). But much depends upon the speed with which the plans are developed, the details of those plans, and the legal status of the resulting plans. I will explore each of those issues below.

The *third* important regulatory development has been the emergence of the Alberta Energy Regulator (AER) (as the successor to the Energy Resources Conservation Board (ERCB) and the Energy and Utilities Board (EUB)) as a single-window regulator of the energy sector.

Another significant change, not directly incorporated in legislation but developed through numerous court decisions, has been the identification and elaboration of the Crown's constitutional duty to consult and accommodate Indigenous communities whose rights (or asserted rights) may be affected by government decisions.

It is difficult to establish an appropriate metric for comparing all of these different legislative regimes and their effective implementation over time. Confidence in the AER as the province's key energy regulator is perhaps at an all-time low. Critics point not only to the well documented ethical lapses at the highest levels of governance within the organization (see [here](#)), but also to the failure of the AER and its predecessors to develop a robust mechanism to ensure timely

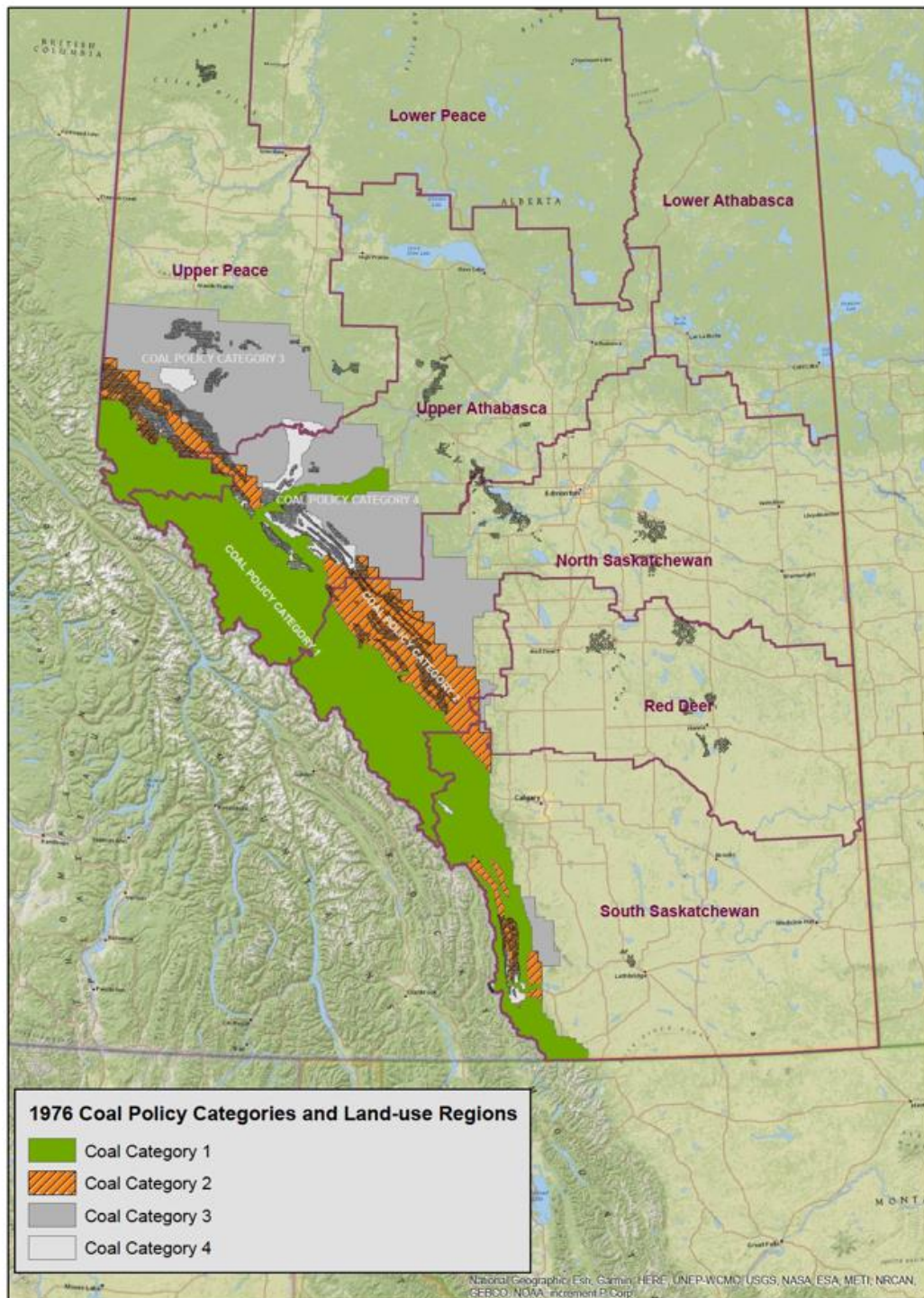
fulfilment by industry of its abandonment and reclamation obligations (see the most recent [ABlawg post](#) addressing these issues).

But more pertinent for present purposes, and easier to assess, is the claim that we don't need the CDP's land use classification because it has now been superseded by modern land use planning. Inferentially if not expressly, this must be a claim that we can rely on the Land-use Framework, *ALSA* and the plans adopted under *ALSA*. As noted above, this requires us to assess whether the necessary plans have been put in place, the terms of those plans, and the legal effect of those plans.

### **Did Rescission of the CDP Create a Gap in Land Use Planning?**

The Framework contemplated the development of plans for seven land use planning regions: Upper Athabasca, Lower Athabasca, Upper Pease, Lower Peace, North Saskatchewan, Red Deer and South Saskatchewan. As can be seen from the map below, lands within Categories 2 and 3 are included within no less than five of these planning regions, Upper Peace, Upper Athabasca, North Saskatchewan, Red Deer, and South Saskatchewan.

Map showing the seven planning regions, the four coal categories and existing leases



Map credit Martin Z Olszynski

It follows from this that the government's claim that modern land use planning has superseded the coal categories can only be true if plans had been completed for each of these five regions.



But that is far from being the case. In fact, only *one* of these five regional plans has been completed, the [South Saskatchewan Regional Plan](#) (SSRP).

But the *existence* of a plan is just the first step in the inquiry as to whether the new plan or plans provide clear guidance as to whether coal mining, and in particular strip mining for coal, should be a potentially permissible use of particular areas. In the case of the SSRP this is clearly *not* the case. As the [first post in this series](#) noted, the SSRP acknowledged the existence of the CDP and its land use categories and effectively punted down the road any detailed assessment of whether lands within Category 2 or 3 should be available for strip mining or not. The SSRP noted that the zonal categories established by the CDP would have to be reviewed “to confirm whether these land classifications specific to coal exploration and development should remain in place or be adjusted” (at 61). The SSRP went on to indicate that it was the government’s

intent for the SSRP and implementation strategies of the regional plan or future associated subregional or issue-specific plans within the region to supersede the coal categories for the purposes of land use decisions about where coal exploration and development can and cannot occur in the planning region. (at 61)

Much the same is also true of the sub-regional planning processes within the region such as the [Livingstone-Porcupine Hills Land Footprint Management Plan](#) (2018). This Plan develops important management thresholds in the form of disturbance limits on motorized access and spatial human footprint targets (at 8 – 11) but when it comes to coal, it too passes the buck:

As part of reviewing and incorporating the Integrated Resource Plans, the Government of Alberta will integrate a review of the coal categories for the South Saskatchewan Region (SSRP p. 61). New direction, consistent with footprint planning outcomes, will supersede the coal categories and may extend to all large-scale industrial surface disturbances, including coal. This new direction should be consistent with an integrated approach. It will specify where surface exploration and development can and cannot occur based on the best and most recent biodiversity sensitivity data. (at 23)

In sum, the SSRP and the subsequent sub-regional plan, did *not* render the land use categories of the CDP obsolete. Instead it contemplated a further process to make these determinations and it also contemplated the continuance of the CDP’s categories until that process was completed. *That process has not been completed and thus, even within the area of the one relevant completed plan, the SSRP, it is plainly impossible to assert that the ALSA plans have superseded the CDP’s classification scheme.* The same is even more obviously the case for those areas covered by the coal categories for which no regional plans have been completed.

There is no doubt that the government *could* have used the SSRP or the sub-regional planning processes to decide if and where strip mining might be a permissible land use within the planning region and to prohibit it in others, and equally it could have done so in a legally binding manner. This much is apparent from the part of the SSRP headed “Regulatory Details.” This part of the SSRP is intended to be legally binding. Of particular interest are Parts 3, 6 and 6.1 of the Regulatory Details dealing respectively with Conservation Areas, Recreation and Parks and

Landscape Management. I have quoted these provisions in my earlier post “[What Are the Implications of Reinstating the 1976 Coal Development Policy?](#)” and will not repeat them here.

### **Did the Government Know that the Rescission of the CLP Would Create a Gap in Land Use Planning?**

It is equally clear that the Government of Alberta was perfectly aware of the gap that would ensue between the protection conferred by the CDP and the protection that *might* be conferred by a *completed* regional plan under the ALSA. This clarity emerges from an [affidavit](#) that the GOA filed in the judicial review application commenced by a group of ranchers against the original decision to revoke the CDP, [Blades et al v Alberta](#). A briefing memorandum to the Minister included in the affidavit advised that immediate rescission of the CDP carried some risk:

- Despite existing land use policies, there is a risk that rescission could result in policy gaps because several Integrated Resource Plans that remain active within the Eastern Slopes rely on the coal categories to establish baseline conditions (mostly in the South Saskatchewan Region, but also a portion of the Upper Athabasca Region).
  - The full extent of the policy gap risk will not be quantified until Alberta Energy completes its review of the coal categories with input from Environment and Parks. This work is expected to be complete in summer 2020. (Briefing Memorandum at 2)

Notwithstanding the concerns articulated with respect to this option, immediate rescission was the option Minister Savage adopted.

If this were not clear enough, the briefing memorandum also included an option, described as the *status quo* option, which was to rescind the Coal Policy “concurrently with the completion of the applicable regional plans” (Briefing Memorandum at 4). The memorandum notes that this would be “consistent with the commitment” in the SSRP (see the above references to the language of the SSRP) and that this option would provide “an opportunity for government to confirm what its management intent is for the province’s coal-bearing areas, including those that have not allowed coal leasing, exploration or development historically, in the context of balancing regional goals and inclusive of site-specific analysis and public input.” It also recognized that this would be a more inclusive approach:

Other Eastern Slopes land users will have the assurance that any concerns they raise about rescission will be considered by government before long term decisions are implemented by the regional plans.

In sum, the Minister of Energy must have understood that the CDP was not completely obsolete, that other policies and instruments depended upon the coal criteria, and that revocation of the CDP prior to the completion of planning in the other four areas and re-visiting the SSRP would create gaps.

This same memorandum makes it clear, however, that the Government was not solely concerned with obsolescence. Instead, its further intention was to make the province more attractive for

investment in coal exploration and development. For example, the memorandum argued that rescinding the separate land classification for coal would “increase equity among all industrial users who compete for access to Alberta's working landscape” and would also “increase the province's attractiveness as an investment destination for coal by expanding and unifying the land base that is available for coal leasing, exploration, and development” (at 1). And finally, it would get rid of the ambiguities in the CDP surrounding when development on Category 2 and 3 lands might exceptionally be permitted, and henceforward all “proposed Alberta coal projects will be reviewed based on merit ...” (*ibid*). The benefits associated with rescission included enhanced lease rental payments (estimated at \$2.3 million per year) and anticipated positive support from “the coal industry, as rescission is something the industry has been advocating for years” (*ibid*).

## Conclusion

Alberta's resources and environmental laws have certainly changed between 1976 and the current time. It would be remarkable if they had not (for a more general overview of changes in Alberta's environmental laws see Nigel Bankes, Sharon Mascher & Martin Olszynski “[Can Environmental Laws Fulfill Their Promise? Stories from Canada](#)” (2014) 6:9 *Sustainability* 6024). But one feature of the 1976 Coal Policy did endure, for all its ambiguity, and that was the concept of the coal categories that effected a basic level of land use planning on the eastern slopes. Thus, while one can conclude that much of the CDP had been superseded by subsequent statutory reforms and policy, this is unequivocally not the case for the land use elements of the CDP. Whatever the aspirational goals of the Land-use Framework and *ALSA* may have been, it is clear that they have yet to deliver the level of guidance that the CDP has provided for more than forty years with respect to the acceptability of coal exploration and mine development on the eastern slopes.

The government could not have reasonably concluded that the CDP had been completely superseded or rendered obsolete. *The government's own briefing papers make this abundantly clear*. The government went ahead and rescinded the CDP in order to encourage investment in coal exploration and development, all the while knowing that the ground rules necessary for ensuring healthy functioning ecosystems at the landscape level were not in place. This is a shaky foundation on which to build the respectful consultation framework that the Department of Energy now promises.

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