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What Are the Implications of Reinstating the 1976 *Coal Development Policy*?

By: Nigel Bankes

Matters Commented On: Alberta Energy Press Release, "Alberta's 1976 Coal Policy Reinstated" (February 8, 2021); Information Letter 2021-07 "Coal Policy Reinstatement" (8 February 2021) and attached Ministerial Order 054/2021

On February 8, 2021, Minister of Energy, Sonya Savage announced via press conference that, effective immediately, the 1976 *Coal Development Policy* (CDP) would be reinstated. The formal press release noted that "[t]his includes reinstating the four coal categories, which dictated where and how coal leasing, exploration and development could occur." In addition, the release stipulated that "[a]ll future coal exploration approvals on Category 2 lands will be prohibited pending widespread consultations on a new coal policy."

But these decisions alone will not restore the status quo as it stood prior to June 1, 2020 when the UCP government revoked the CDP without consultation. This makes the claim of reinstatement hollow - for at least two reasons.

First, since revocation of the CDP the province has issued a large number of new leases on Category 2 lands to companies that applied for leases between 1976 and revocation of the Policy on June 1, 2020. I don't know in total how many such leases were granted but the government's affidavit filed in the Blades judicial review application indicated that, as of early 2020, the Department had on file "506 coal lease applications (652,000 hectares) province-wide." The province has not cancelled any of these leases. The only leases that have been cancelled were the few additional leases the Department issued as a result of a sale on December 15, 2020 (cancelled January 18, 2021).

Under section 8(1)(c) of the *Mines and Minerals Act*, RSA 2000, c M-17 (*MMA*) the Minister has the authority to cancel a lease if she

> … is of the opinion that any or any further exploration for or development of the mineral to which the agreement relates within that location or part of it is not in the public interest, subject to the payment of compensation determined in accordance with the regulations for the lessee's interest under the agreement;

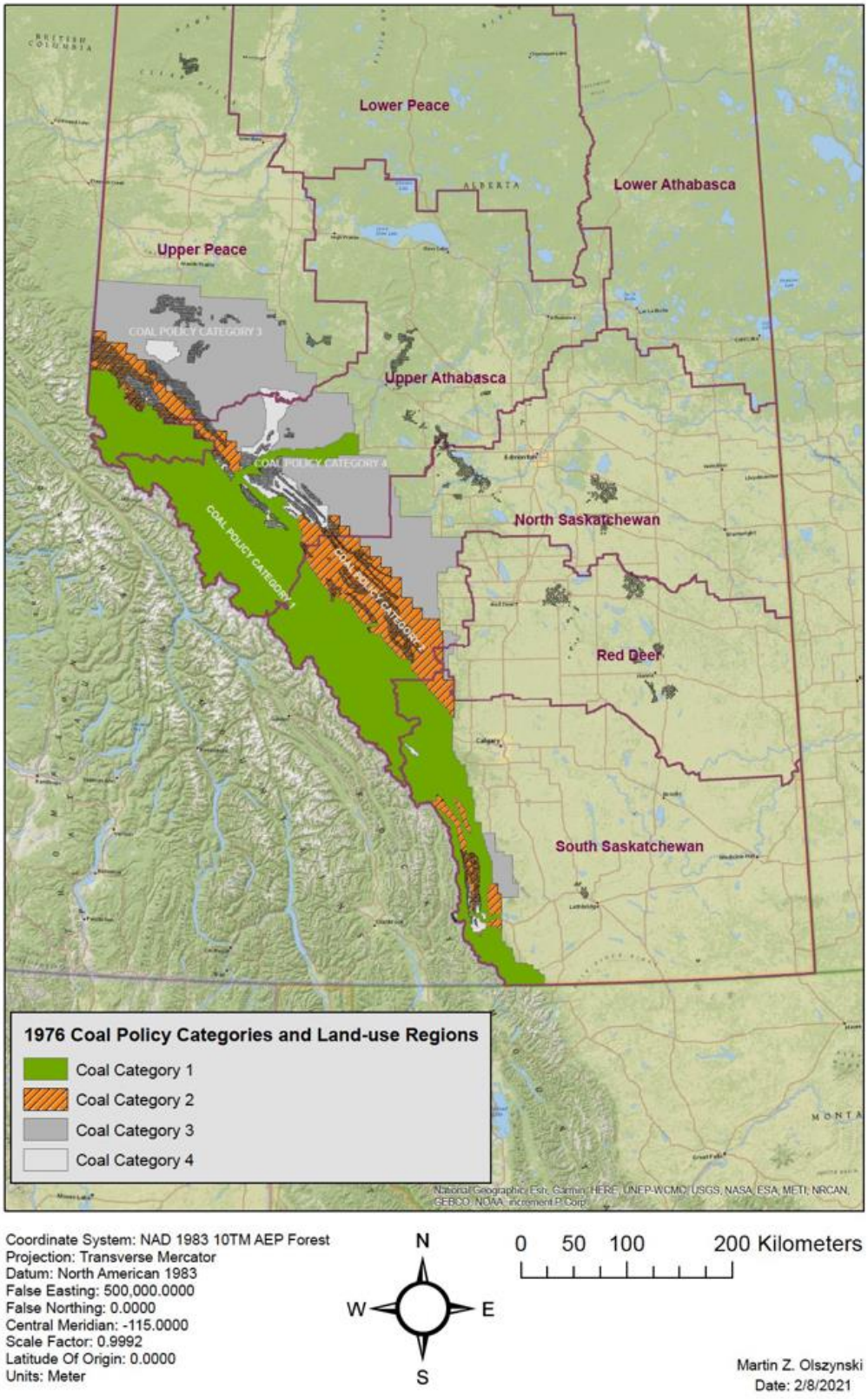
The term "agreement" under the *MMA* includes a coal lease. The regulation providing for compensation is the *Mineral Rights Compensation Regulation*, Alta Reg 317/2003.

Second, in her remarks, the Minister made it clear that while she had issued a direction to the Alberta Energy Regulator (AER) not to process new application for the approval of exploration programs, this direction did *not* apply to exploration programs that had already been approved. Exploration programs are approved by the AER under Part 8 of the *MMA* and the delegation of

authority to the AER under the terms of the *Specified Enactments (Jurisdiction) Regulation*, Alta Reg 201/2013. Readers can assess how many coal exploration programs have been approved in the intervening period by searching the AER's website on the "publication of decision" page using the term "coal exploration."

While section 108.4(1) of the *MMA* gives the Minister or the AER the authority to issue a stop work order in relation to exploration activities, it appears that this authority may only be exercised for cause (e.g. breach of a term or condition of approval). In other words, it is a narrower power than the Minister's power under section 8 of the *MMA* referenced above, which can be exercised if the Minister believes that continued exploration is not in the public interest. Exploration programs may authorize a variety of exploration activities over more than one year: see Manual 008, Oil Sands and Coal Exploration Application Guide, issued in 2014 and Manual 020 Coal Development, issued in August 2020.

Minister Savage also indicated that she would be commencing consultations with respect to the development of a new provincial coal policy. While the announcement of new consultations is hardly a surprise in response to outcry from civil society and municipal governments as to the total absence of consultation back in the spring, it is less than clear what the consultations will focus on – or the legislative framework for that consultation. In practical terms, the only part of the CDP that remained operational were the land use categories. Since the CDP of 1976, Alberta has adopted a comprehensive Land-use Framework (2008) (Framework) and the associated *Alberta Land Stewardship Act*, SA 2009, c A-26.8 (*ALSA*). In other words, we now have a vehicle for making landscape-level land use planning decisions and a legislative framework for making those decisions legally binding. The problem is that the Government of Alberta has not made effective use of this regional planning process in the context of coal mining activities. The Framework contemplated seven regional planning regions, of which no fewer than five (as the map below illustrates) engage in some way with CDP's land use categories: Upper Peace, Upper Athabasca, North Saskatchewan and South Saskatchewan.



Map credit Martin Z Olszynski

Of these five planning regions, only *one* has a finalized plan. This is the South Saskatchewan Regional Plan (SSRP). But as an earlier post noted, while the SSRP acknowledged the existence of the CDP and its land use categories, the SSRP effectively punted down the road any detailed assessment of whether lands within Category 2 or 3 should be available for strip mining or not.

At the same time, there is no doubt that the government *could* have used the SSRP to decide if and where strip mining might be a possible land use within the planning region and to prohibit it in others. There is also no doubt that it could have done so in a legally binding manner. This much is apparent from the part of the SSRP headed "Regulatory Details" (at 163). This part of the SSRP is intended to be legally binding. Of particular interest are Parts 3 and 6 of the Regulatory Details - dealing respectively with Conservation Areas and Recreation and Parks. In each case the Plan adopts highly prescriptive language along the following lines:

> … a decision-maker shall not, with respect to [prescribed lands] … grant or renew any of the following statutory consents:
> (a) an approval under the *Coal Conservation Act*;
> (b) an approval under the *Oil and Gas Conservation Act*;
> (c) an approval under the *Oil Sands Conservation Act*;
> (d) a licence under the *Pipeline Act*;
> (e) a disposition under the *Public Lands Act*. (at 169, 177)

One might also add, depending upon the circumstances, a disposition or agreement under the *Mines and Minerals Act*.

In short, we have a provincial land use planning framework, and we have the means to make legally binding decisions about land use. Furthermore, section 5 of the *ALSA requires* public consultation as part of making or amending a regional plan. It seems odd that Minister Savage made no reference to the *ALSA* and the Framework when promising consultations. Is this the framework within which the new coal policy consultations will take place? If not, why not?

It should be noted that there is also the matter of consultations with First Nations. Major land use decisions such as those embedded in the revocation of the CDP trigger a constitutional duty to consult with Indigenous communities whose rights may be affected. Minister Savage also needs to address this important and distinct element of the duty to consult as the government re-examines how and if coal mining is part of our shared future,

Finally, a brief word about the Grassy Mountain Coal Project. This is a proposed mine on Category 4 lands, with a decision pending on an environmental assessment by a joint (federal/provincial) review panel operating under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52. As a project on Category 4 lands, revocation of the CDP will have no effect on this project. But what about Minister Savage's comments ruling out any project that involved "mountain top removal"? Do those comments apply to the Grassy Mountain Project? While some of her remarks might support the inference of a general prohibition on "mountain top removal", the Department's Information Letter (which includes the new direction to the AER) makes it clear that that is not the case. The Direction (para 1(d)) quite specifically states

that the confirmation required that a project not involve mountain top removal only applies to a project on Category 2 lands.

In sum, Minister Savage claims that the 1976 Policy has been reinstated, but a lot of activity has occurred between June 1, 2020 and February 8, 2021, and none of that has been rolled back. This is not reinstatement; it is *reinstatement-minus what has happened since June 1*.

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